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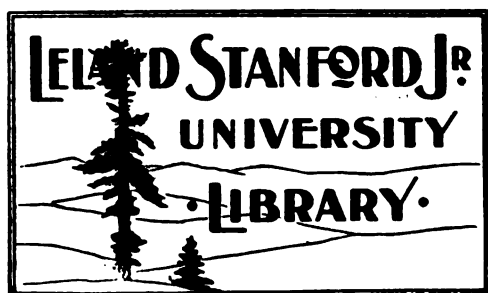
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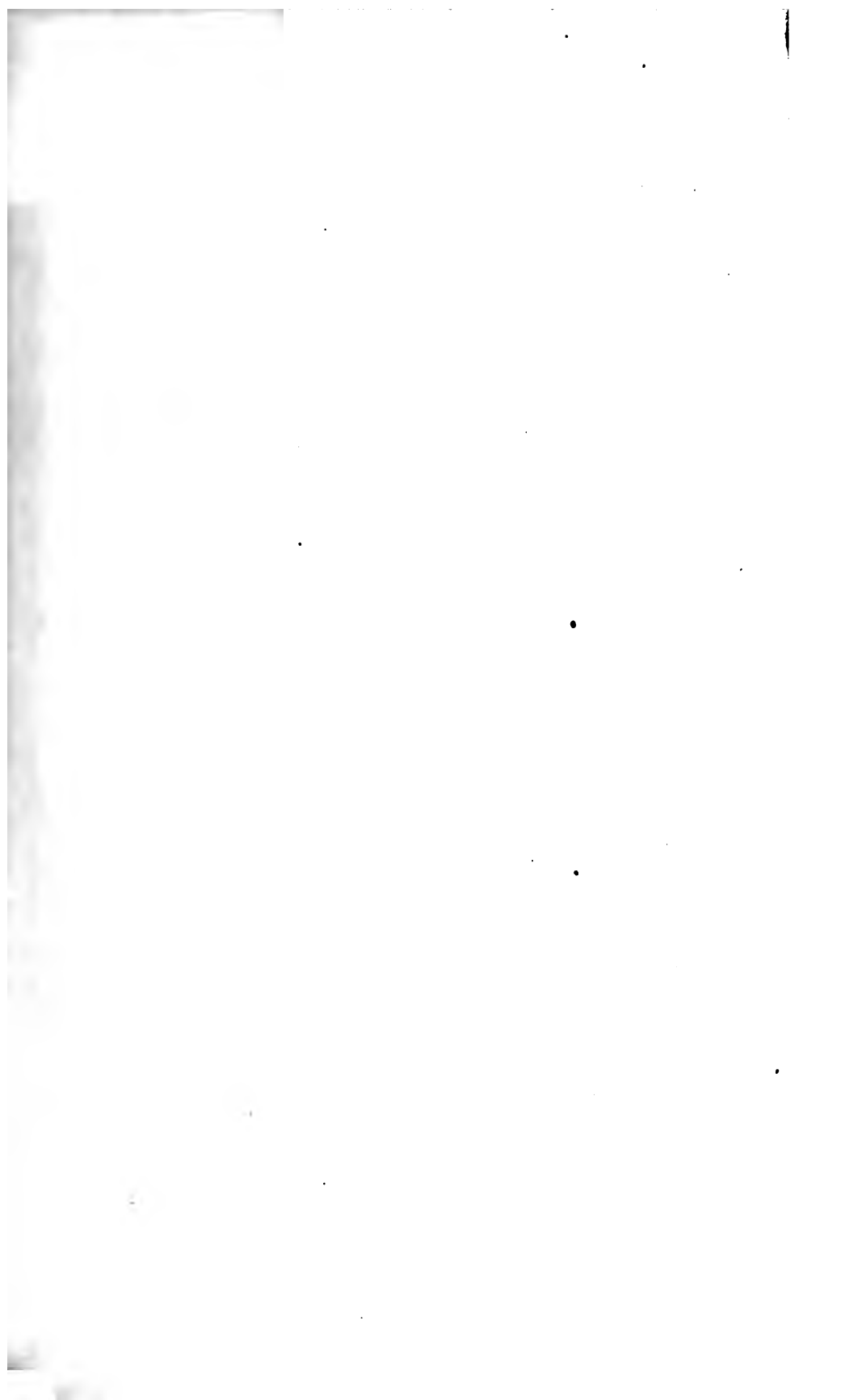
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A
PRACTICAL TREATISE
ON THE
LAW OF HIGHWAYS,
INCLUDING
WAYS, BRIDGES, TURNPIKES, AND PLANK ROADS,
AT
COMMON LAW AND UNDER THE STATUTES;
WITH AN
APPENDIX OF FORMS.

By ISAAC GRANT THOMPSON,
COUNSELLOR AT LAW, AUTHOR OF A TREATISE ON THE LAW AND
PRACTICE OF PROVISIONAL REMEDIES.

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TO

ROSWELL A. PARMENTER,

AS A TRIBUTE OF

RESPECT FOR HIS ABILITIES AS A LAWYER AND ADVOCATE, AND FOR
HIS MORAL WORTH AND PROFESSIONAL COURTESY,

THIS WORK IS INSCRIBED,

BY

THE AUTHOR.



PREFACE.

I HAVE attempted, in the following pages, to collect and exhibit under one view, the whole of the law relating to public ways, and to reduce into one continuous system its various principles. The need of a work of the kind has long been felt, both by the members of the legal profession and by those officers to whom are intrusted the care and superintendence of highways; and no reasonable endeavor has been spared to make this book such as would supply that need. I have given the various statutes at length, in order to make the treatise in itself a practical compendium of the whole law upon the subject, and a safe guide wherever the statute book may not be accessible. With the same object I have endeavored to collect and examine all the decisions pronounced by the courts, and to so state the principles decided as to meet the requirements of the profession, and to be readily understood by the non-professional reader.

I take pleasure in acknowledging my indebtedness to CHAUNCEY A. DEYOE, Esq., for copying a large portion of the statutes printed in this work, and I trust that his ability, integrity and industry may bring to him that success in the profession which he so justly merits.

I. G. T.

TROY, *February*, 1868.

CONTENTS.

CHAPTER I.	PAGE.
DEFINITION, AND DIFFERENT KINDS OF HIGHWAYS.....	1
CHAPTER II.	
CONCERNING THE FEE IN HIGHWAYS'	21
CHAPTER III.	
HIGHWAYS BY DEDICATION	46
CHAPTER IV.	
COMMISSIONERS, THEIR POWERS AND DUTIES	60
CHAPTER V.	
OVERSEERS, THEIR POWERS AND DUTIES	111
CHAPTER VI.	
ASSESSMENT OF HIGHWAY LABOR.....	125
CHAPTER VII.	
PERFORMANCE OF HIGHWAY LABOR.....	137
CHAPTER VIII.	
LAYING OUT HIGHWAYS	156
CHAPTER IX.	
ALTERING AND DISCONTINUING HIGHWAYS	180
CHAPTER X.	
ASSESSMENT OF DAMAGES ON LAYING OUT ROAD	190
CHAPTER XI.	
APPEAL FROM THE COMMISSIONERS	206
CHAPTER XII.	
OBSTRUCTIONS AND ENCROACHMENTS.....	230
CHAPTER XIII.	
BRIDGES.....	260

	PAGE.
CHAPTER XIV.	
RAILROAD IN HIGHWAYS AND STREETS	290
CHAPTER XV.	
SIDEWALKS	307
CHAPTER XVI.	
TRAVEL UPON HIGHWAYS.....	315
CHAPTER XVII.	
CATTLE IN HIGHWAYS.....	327
CHAPTER XVIII.	
WAYS AND PRIVATE ROADS	336
CHAPTER XIX.	
PLANK ROADS AND TURNPIKES	353
APPENDIX.	
APPENDIX OF FORMS.....	425

THE LAW OF HIGHWAYS.

CHAPTER I.

DEFINITION AND DIFFERENT KINDS OF HIGHWAYS.

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| 1. Definition. | 6. Railroads. |
| 2. Extra Viam. | 7. Bridges. |
| 3. Cul de Sac. | 8. Ferries. |
| 4. Streets. | 9. Navigable Rivers. |
| 5. Turnpike and Plank Roads. | |

I. DEFINITION.

A highway is a way over which the public at large have a right of passage, whether it be a carriage way, a horse way, a foot way, or a navigable river. (3 *Kent*, 432.)

It was considered formerly that no way which did not lead to a market town was a highway; but it is now well settled that any way common to all people, without distinction, is a highway. (1 *Hawk.*, c. 76, § 1; *Wellbeloved on Highways*; *Brand's Dic. tit. "Roads;" People v. Kingman*, 24 *N. Y. R.* 559.)

It was said by Lord Coke that there are three kinds of ways: a foot way; a pack and prime way, which is both a foot way and horse way; and a cart way, which includes the other two. (*Coke Litt.*, 56 a.) But notwithstanding these distinctions, it is well established that any of the said ways which is common to all persons, may properly be called a highway. (*Egremont on Highways*, 2.)

"There is no doubt," says Lord Ellenborough, "that a public foot way, or bridle way, is a highway; it is a highway for foot passengers, or for horse passengers; and

the parish is bound to repair it, till they can throw the *onus* upon others. So all public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges." (*Rex v. County of Salop.*, 13 *East*. 95.)

The size of the way is not material. A right of way for all persons to pass and repass with their carts and carriages, is not restrained because all carriages cannot pass and repass. (*Rex v. Lyon*, 5 *Dow. and R.* 497.)

There is also at common law, a way termed a *drift-way*, or a way over which cattle are driven; but this is also included in the generic term "highway;" for Lord Mansfield has laid it down that in general a public highway is open to cattle, though it may be so unfrequented that no one has ever seen an instance of their going there; the presumption is for cattle as well as carriages, otherwise cattle could not be driven from one part of the country to another. (*Ballard v. Dyson*, 1 *Taunt.* 285.)

2. EXTRA VIAM.

If passengers have used time out of mind, when the roads are bad, to go by outlets on the land adjoining a highway in an open field, such outlets are parcel of the highway; and therefore if they be sown with corn, and the tracts foundrous, the public may go upon the corn, for highways are for the public service, and if the usual tract is impassable, the people are entitled to pass on another line. (1 *Roll. Abr.* 390; 2 *Doug.* 748; 1 *Hawk. P. C.*, ch. 76, § 2.)

So, if a highway be impassable or foundrous, or even dangerous to be traveled over, or inconvenient from being out of repair, or from other causes, the public have a right to a new way for the time being, and for this purpose, may go on the adjoining land; and it makes no

difference whether it be sown with grain or not. And if the adjoining lands be inclosed, the traveller may remove so much of the fence as will enable him to pass around the obstruction; but he must do no unnecessary injury. (*Williams v. Safford*, 7 Barb. 309; *Sir W. Jones*, 296; 2 *Show*, 28.) But this privilege of going over adjoining lands if the way be impassable or foundrous is confined to highways; and the grantee of a private way cannot take advantage of any such liberty. (*Taylor v. Whitehead*, Doug. 745; *Bullard v. Harrison*, 4 M & S. 387.) Land adjoining a public highway, remaining unenclosed, is considered as dedicated to public use, and no action will lie by the owner against any person travelling over it. (*Cleveland v. Cleveland*, 12 Wend. 172.) But in an earlier case in the same court, it was held that all the land within a highway fence was not necessarily subject to the right of way; and if not, may be occupied by the owner. And if he place an obstruction there and another be injured by it, he is not therefore liable. (*Harlow v. Humiston*, 6 Cow. 189.)

3. CUL DE SAC.

It has been a subject of much doubt in the English courts, whether there could be a highway where there was no thoroughfare, or passage through—that is whether a road or street which is closed at one end, and only communicates with a public highway or navigable river at the other, could be a highway. Such a passage is called a *cul de sac*. Lord Kenyon, in the case of *The Rugby Charity v. Merryweather* (11 East. 375 n.), decided that it made no difference whether or not a street was a thoroughfare; that there might be a highway where there was a *cul de sac*; and that it was a question for a jury on evidence, whether there was a public highway or not. Although there appear to be no decisions expressly overruling this case, yet it was afterwards doubted by Lord Mansfield in

Woodyer v. Hadden, (5 *Taunt.* 125,) and by Justices ABBOTT, HOLROYD and BEST, in *Wood v. Veal*, (5 *Barn. & Ald.* 454.) Mr. Wellbeloved, also, in his treatise on highways, after an examination of the above cases, lays it down, "that there can be no highway where there is no thoroughfare." (*Wellb. on Highways*, 1.) But the more recent English decisions are adverse to this proposition, and sustain the decision of Lord Kenyon. In the case of *Bateman v. Black*, (14 *Eng. Law & Eq.* 69,) which came before the Court of Queen's Bench in 1852, the question was directly in issue, and Lord Campbell announced his opinion as follows: "We must take it that there is a good finding on this issue, unless there cannot, in point of law, be a good highway where there is no thoroughfare. Now such a position cannot, I think, be supported. There may be, or there may not be, a highway under such circumstances. It would be very strong to hold that there could be no highway—even where there has been an express dedication to a public purpose—because the place is no thoroughfare. There may be a large square with only one entrance to it, and if the owner allows the public to use it without restriction for a great many years, he cannot afterwards turn round and say they are all trespassers. That would be, as said by Lord Kenyon, a trap to catch trespassers. In the *Rugby Charity v. Merryweather*, Lord Kenyon laid it down that there might be a public highway where there was a *cul de sac*; and that it was a question for a jury, on evidence, whether such a place was a highway or not. I do not find that this case has ever been expressly overruled. In the other cases referred to, the judges do not hold that such highway does not exist, but only say that there is no evidence of there being a highway. It seems to me that it rests on principles of convenience, that there may be a highway without a thoroughfare; and it is not inconsistent with what is laid down by

Hawkins and other text writers on the subject." This was concurred in by all the judges in that case. The opinion of EARLE J. was in brief, as follows: "The question is whether there can be in law a highway where no thoroughfare exists. It seems to me clear from the authorities that there can be such a highway, and convenience requires that this should be so. It is for the jury to consider whether on the whole of the facts proved they will presume a dedication to the public."

In this State it may be regarded as settled that, both at common law and under the statute, a *cul de sac* may be a highway. (*People v. Kingman*, 24 N. Y. R. 559; *Wiggins v. Tallmadge*, 11 Barb. 457; *Hickok v. Trustees of Plattsburgh*, 41 Barb. 135.) But whether it is a highway, or a private passage, depends upon the user or dedication, and is to be decided by the jury.

Where a highway terminates at one extremity in a navigable river, it is not, in any sense of the term, a *cul de sac*, since it connects the right of passage on the land with a like right on the water; and any change in the line of the shore, either from natural or artificial causes, cannot affect the right of way to the river. If, therefore, the owner of the adjoining land, under authority from the Legislature, builds a bulkhead in front of his land and the street, and fills up the intermediate space, the highway is not thereby cut off from the river, but is extended by operation of law, over such new made land to the water. (*People v. Lambier*, 5 Denio 9.)

Where a highway extends to navigable waters, it cannot be used as a place of deposit by the public; and it was even held by Mr. Justice COWEN, in a most elaborate opinion that, "the landing of wagons, horses and passengers on the shores of a river, a sea or an ocean, even though it be upon a dedicated or recorded highway, on the land connected with the watery way, and for the direct purpose of going onward, is still a trespass on the riparian owner,

unless we could suppose such acts to be performed without any contact between the vessel and the shore." (*Pearshall v. Post*, 20 *Wend.* 131; see also *Chambers v. Furry*, 1 *Yeates*, (*Penn.*) 167; *Cooper v. Smith*, 9 *S. & Rawle*, 26.) But this *dictum* of the learned judge has been overruled by more recent decisions, and the right of the public to land in such cases, established. (*Fowler v. Mott*, 19 *Barb.* 204.) The same principle is laid down also by the English writers; for with regard to a ferry it is stated, that a ferry is as much a highway as a bridge; and that, therefore, the public have a right to embark and disembark at the landing places, provided such landing place be a highway. (*Wellb. on Highways*, 35; *Peters v. Kendal*, 5 *B. & Cress.* 703.)

4. STREETS.

The word "highway" is said to be the *genus* of all public ways (*Regina v. Saintiff*, 6 *Mod.* 255), and includes the streets of a city or village. (*Benedict v. Goit*, 3 *Barb.* 459; *Adams v. Wash. & Sar. R. R. Co.*, 11 *Barb.* 449; *In re Fitz-Water street*, 4 *S. & Rawle*, 106; *Brace v. N. Y. Central R. R. Co.*, 27 *N. Y. R.* 271.) Nevertheless there is a wide distinction between a highway in the country and a street in a populous city, as regards the mode and extent of their enjoyment. The reason for the restricted use of highways in the country is that they are needed for no other purpose, than for passing and repassing; but such is not the case with the streets of a city. There are certain uses—such as the construction of sewers, and the laying of water and gas pipes—to which, in modern times, such streets have generally been applied. These urban servitudes, as they are called, are the necessary incidents of a street in a large city; and whether the street be laid out and opened upon property belonging to the corporation, or whether they become public streets by dedication

or by grant, or upon compensation being made to the owner of the fee, they have all the incidents attached to them, which are necessary to their full enjoyment as streets. And whether the corporation be the owner of the fee of the streets, in trust for the public, or whether it be merely the trustees of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways. (*Milbau v. Sharp*, 15 Barb. 210; *People v. Kerr*, 27 N. Y. R., 202; *White v. Cincinnati*, 6 Peters, 432; *Kelsey v. King*, 32 Barb. 410.) This doctrine, so far as it applies to highways acquired by dedication, was, however, doubted by DAVIS C. J., in *Kelsey v. King*, 33 How. 39. With regard to the streets in the city of New York, it is held that the fee in the soil of all such as are opened under the provisions of the acts of 1807 and 1813, rests in the corporation for public use. (*Hoff. Treatise*, 289; *People v. Kerr*, 27 N. Y. R., 188; *Drake v. Hudson River R. R. Co.*, 7 Barb. 508.)

5. TURNPIKE AND PLANK-ROADS.

Turnpike and plank-roads are also regarded as public highways, established by public authority for public use. The only difference between these and common highways is, that instead of being made at public expense, they are authorized and laid out by public authority, and made at the expense of individuals, and the costs of construction and maintenance are reimbursed by a certain established toll. Every traveller has the same right to use them on payment of the legal toll, as he would have to use any other public highway. Nor does a highway appropriated to the purposes of a turnpike or plank-road, cease to be a public highway. The general right of the public to use it remains unimpaired. The public in consideration of

the payment of certain tolls, is relieved from the burden of amending and keeping it in repair; and the duties, in this respect, which before belonged to the commissioners of highways and other local officers, are transferred to the corporation. But it seems that these local authorities are not ousted of their jurisdiction in the particulars in which their exercise would not conflict with the purposes or rights of the corporation, and which the public interest requires should be exercised; and, especially, that they are not relieved from their duties in respect to encroachments upon highways, which are at the same time used as plank-roads or turnpikes. (*Walker v. Caywood*, 31 N. Y. R. 51; *Benedict v. Goit*, 3 Barb. 459; *Commonwealth v. Wilkinson*, 16 Pick. 175; *Fort Edward, &c. Plank-road v. Payne*, 17 Barb. 567; see otherwise *Estes v. Kelsey*, 8 Wend. 555; explained in *Walker v. Caywood*, *supra*.) Since the corporation succeeds to the rights and duties of highway commissioners in making repairs and altering the grade of the road, it follows, that it is not liable to any person suffering damages for a reasonable and proper exercise of its powers in repairing and grading; but for any unreasonable use of these powers the corporation is responsible. (*Benedict v. Goit*, 3 Barb. 459.)

6. RAILROADS.

It has been held, that a railroad, like a turnpike or plank-road, may be a public highway, to be used in a particular manner. (*Rex v. Severn Railway Co.* 2 B. & Ald. 646; see *People v. Kerr*, 27 N. Y. R. 205.) But such use is wholly unlike that of an ordinary highway, and, to a great extent, the two uses are inconsistent with each other; and, it is well settled, that the laying of a railroad on a highway, imposes an additional burden on it, essentially different from the original object of a highway, and entitles the owner of the fee to additional com-

pensation. (*Williams v. N. Y. Central R. R. Co.* 16 *N. Y. R.* 97; *Presbyterian Society v. Auburn, &c. R. R. Co.* 3 *Hill*, 567; *Springfield v. Connecticut River R. R.* 4 *Cush.* 63; *Mahon v. N. Y. Central R. R. Co.* 24 *N. Y. R.* 658.) And the rule is the same, whether it be a street in a city or a common highway in the country, except in the city of New York, where the fee of most of the streets is said to be in the corporation. (*Id.*; *Wager v. Troy Union Railroad Co.* 25 *N. Y. R.* 529.) See further on this subject, post, chapter on railroads in highways and streets.

With regard to street or horse railroads, it is thought that they approximate more closely to ordinary highways, and that the use of streets for such railroads is within the purpose for which such streets have been opened or dedicated, and consistent with the public use as highways; and, that, therefore, the legislature can authorize the construction of such railroad in the streets of a city, without compensation to the owner of the fee. (See *People v. Kerr*, 27 *N. Y. R.*, 194, 202; *S. C.* 37 *Barb.* 357, and dissenting opinion of SUTHERLAND, J., in *Wager v. Troy Union R. R. Co.* 25 *N. Y. R.* 537.) But there seem to be no controlling decisions to that effect, and that principle can hardly be regarded as established. I shall treat more fully on this subject hereafter in the chapter on railroads in highways and streets.

7. BRIDGES.

A public bridge may also be a highway, governed by the same principles of the common law which apply to highways in general. (2 *Ld. Raym.* 1174; 6 *Mod.* 255; *Woolr. on Ways*, 195.) The principal circumstance necessary to constitute a public bridge is, that people at large may have a free and uninterrupted use of it, not upon sufferance, but as a matter of right. (3 *Woolr. on Ways*, 195.) Yet a bridge may be common to all people

without becoming a public highway, so as to render the town responsible for its repairs. Thus, where a corporation or an individual digs a race-way or canal across a highway, and builds a bridge over it, the party building it must keep it in repair, and if an injury happen to another in consequence of its being out of repair, such party is responsible. (*Heacock v. Sherman*, 14 Wend. 58; *Dygert v. Schenck*, 23 Wend. 446.) This principle is commended both by its sound sense and its antiquity. In Rolle's Abridgement (*Roll. Abr.* 368; *Bridges*, pl. 2), citing a manuscript case of 8 Edw. 2, decided near the beginning of the 14th century, the principle is stated as follows: "If a man erects a mill for his own profit, and makes a new cut for the water to come to it, and makes a new bridge over it, and the subjects are to go over this as over a common bridge, this bridge ought to be repaired by him who has the mill, and not by the county, because he erected it for his own benefit."

So where a company in making a canal cuts through a highway, and erects a bridge over the canal, they are bound to repair it, as the public derive no benefit from the bridge, more than they had from traveling along the solid highway. (*Rex v. Kerrison*, 3 M. & S. 526.) The public to become chargeable must derive some benefit from the bridge, which they manifestly do not, where the way was as good before the erection of the bridge as after it.

Where, however, a man builds a bridge which is *useful* to the public in general, it is the duty of the town to repair it, notwithstanding it may be of benefit to the builder. (*Rex v. The West Riding of Yorkshire*, 5 Burr, 2594; *Heacock v. Sherman*, 14 Wend. 58.) As where an individual erects a bridge over a *natural stream* for his own benefit, and it is of public utility, and is used by the public, the public is bound to keep it in repair, for, in such case, although the bridge is of advantage to the indi-

vidual, he cannot be said to have created the necessity for it. (*Id. Dygert v. Schenck*, 23 Wend. 446.)

In accordance with these cases, where M built, for his private benefit, a bridge across the river Tave, where it intersected the highway, which bridge was used by the public, and was of great public utility, the court held that the public must keep it in repair. (*King v. Inh. of Glamorganshire*, 2 East. 356, note.)

So, where a person about forty-five years back erected a mill and dam for his own profit, whereby he deepened the water of a ford, through which there was a public highway, but the passage through which was, before the deepening, very inconvenient to the public, and the miller, about five years afterwards, built a bridge over it; and there was no doubt that the public had since used it; but it was admitted that the miller had repaired it; the Court of King's Bench held that the county and not the miller were chargeable with the reparation, according to the principle, that "if a private person build a bridge, which afterwards becomes of public convenience, the county is bound to repair it. (*Rex v. Inh. of Kent*, 2 M. & S. 513.) But where the Medway Navigation Company were authorized by act of Parliament to make the river navigable, and to amend and alter such bridges or highways as might hinder the navigation, *leaving them or others as convenient in their room*; and under this authority the company deepened a particular spot in the river, where before had been a ford, and afterwards built a bridge and kept it in repair till its destruction by a flood. It was held that the company and not the county were bound to rebuild the bridge. And per Lord Ellenborough, C. J. : "The power given to the company to take or alter the old highway was upon condition of leaving another passage as convenient in its room; and if they do not perform the condition they are not entitled to do the act; it is a continu-

ing condition, and when the company thought proper, for their own benefit, to alter the highway in the bed of the river, so that the public could no longer have the same benefit of the ford, they were bound to give another passage over the bridge, and to keep it for the public." (*Rex v. Inh. of Kent*, 13 *East*. 220.)

It is held not to change the rule that the bridge built by a private individual is of public utility only at certain seasons of the year. Thus, a bridge was used by the public, at all times, on foot and with horse, but only occasionally with carriages, except in times of flood or frost, when it was unsafe to pass through the river, at which times carriages always passed over the bridge. In ordinary times the carriages road went through the ford, and the bridge was sometimes barred against carriages by means of a post and chain. It was held by the court that such a limited enjoyment was quite consistent with the idea of a public bridge. (*Rex v. Inh. of Northamptonshire*, 2 *M. & S.* 262.) Again, a causeway and bridge were only used by the public in time of floods, and in the time of very high floods the bridge itself was impassable, but they were at all times open to the public : it was held that this was a public bridge. (*Rex v. Inh. of Devon*, *Ry & M.* 144. See 2 *Campb.* 455.)

Lord Coke says : "If a man make a bridge for the common good of all the subjects, he is not bound to repair it; for no particular man is bound to reparation of bridges by the common law, but by tenure or prescription." (2 *Inst.* 701.) But if a man erect a useless or a merely ornamental bridge, neither he nor the public are bound to maintain it. (*Wellb. on Highways*, 326.) At common law the duty of repairing public bridges rested upon the county at large, where it was not shown that any private person, or other body, was charged with that duty. (*Rex v. Inh. of West Riding of Yorkshire*, 2 *East*. 342 ; *Hill v. Supervisors*,

Sec. 12 N. Y. R. 52.) But this law has never been in force in this State, since from the earliest times the care and reparation of highways, including bridges, has been committed to town officers. (*Hill v. Supervisors, supra.*) It was said by Lord Ellenborough that "all public bridges are *prima facie* repairable by the inhabitants of the county, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges. (*Rex v. Inh. of Salop, 13 East. 95.*)

A toll bridge may also be a highway, only differing from an ordinary public bridge in this, that the public, in consideration of the payment of certain tolls, are relieved from the responsibility of keeping it in repair. Subject to the payment of such tolls the rights and privileges of the public on such bridges are the same as on ordinary public bridges. In the case of *Thompson v. Matthews*, (2 *Edw.* 212) it appeared that the plaintiffs, under authority from the Legislature, had constructed a bridge across the Harlem river in the manner and of the dimensions directed and required by the act authorizing its construction, and that the defendants were in the habit of hauling across such bridge immense loads of marble, weighing several tons, and thereby greatly endangering the bridge, and an injunction was prayed, restraining such defendants from transporting across the bridge any marble or stone in quantities exceeding at one time or in any one load the weight of two tons. The Vice Chancellor said, "The motion for an injunction cannot be granted. The road across the bridge is undoubtedly a highway, though all persons and carriages passing must pay a toll; but still it is a public highway. The affidavits in opposition take very much from the force of the allegations in the bill. But this is a case in which the parties have legal rights. The bridge is a public one. If persons take improper loads and the bridge has been properly constructed,

then the owners of it have a remedy by a special action on the case, or in trespass for damage done; while on the other hand, if passengers and their property should sustain an injury by a breaking from ordinary loads, the owners must respond in damages."

8. FERRIES.

A ferry also, though its nature is *sui generis*, is not inconsistent with the general principles of the law regarding highways, for it is a common passage, which is no more than a common highway. (3 *Mod.* 294; *Woolr. on Ways*, 217.) Most of the confusion which has prevailed upon this subject, appears to have arisen from not distinguishing between the public privilege and the private right, which unite to form a ferry—the public privilege of passing across the water, and the private right to carry passengers over and to receive the toll. (*Wellb. on Highways*, 33.) The interests of the public in a ferry is exactly similar to their interest in highways in general; consequently they are only possessed of an easement, and can claim no property in the soil. The privilege of landing at either end of the ferry is an easement upon the freehold.

In *Chambers v. Furry*, (1 *Yeates* 167) the Supreme Court of Pennsylvania held, that the owner of a ferry over a navigable stream had no right to land or receive freight or passengers on the adjoining banks, even though the landing place was a public highway, without the owner's consent. The dedication of ground for the purpose of a public road was said to give no right to use it for the other purpose. This doctrine was afterwards referred to, recognized and adopted by the same court, in *Cooper v. Smith*, (9 *Serg. & Rawle*, 26. See also *Pipkin v. Wynns*, 2 *Dev. N. C. Rep.* 403; *Chess v. Manown*, 3 *Watt*, 219;) also in this State by Mr. Justice COWEN in *Pearsall v. Post*. (20 *Wend.* 132.) The same principle is to be found in *Saville* 11, pl. 29, where

it is said, that in every ferry the land on both sides the water ought to belong to the owner of the ferry, for otherwise he could not land on the other side. But this strict and severe rule is somewhat relaxed in England; and in *Peter v. Kendal*, (6 Barn & Cress. 703) the King's Bench denied the justness of the conclusion in Saville, and held that the owner of a ferry need not have the property in the soil on either side. It was sufficient that the landing place was a public highway. It was a right incident to the ferry, to use such a landing place for the purposes of a ferry. The same conclusion was arrived at in this State by Mr. Justice STRONG in *Fowler v. Mott*. (19 Barb. 219. See also *Gould v. Hudson River R. R. Co.*, 6 N. Y. R. 522; 3 Kent. 421, note.) And this is the most reasonable conclusion upon the right to the use of a public highway to which a ferry is connected.

9. NAVIGABLE RIVERS.

A navigable river, common to all men, is a highway; and if the water change its course, and go over ground different from that on which it used to run, the highway will be along the new channel, in the same manner as the old. (1 Hawk. c. 76, § 1; 4 Com. Dig. *Chimin*, A. 1; 10 Mod. 382.) But if the river be choked up with mud, and impassable, that would not give the public a right to make use of the adjoining lands by cutting another channel or passage; though it is quite clear that if the usual track of a highway become impassable, the public have a right to go on the adjoining lands. (*Per Buller in Ball v. Herbert*, 3 T. R. 263.)

By the common law of England those rivers are navigable where the tide flows and reflows; and the crown has the absolute proprietary interest in such rivers, and in the shores below the ordinary high water mark. But above the flow of tide-waters, or where the tide does not ebb and

flow, rivers are not technically navigable at common law, though of sufficient capacity for valuable floatage. (*Hale De Jure Maris*; *Ex parte Jennings*, 6 Cow. 518; *Morgan v. King*, 35 N. Y. R. 458.)

This doctrine of the common law has been repeatedly recognized by the Supreme Court of this State as the law of our own State, and has as such received the sanction of high legal and judicial authority. (3 *Kent*, 414; *Canal Commissioners v. The People*, 5 *Wend.* 444; *Canal Appraisers v. The People*, 17 *Wend.* 595; *Commissioners v. Kempshall*, 26 *Wend.* 415; *Hooker v. Cummings*, 20 *John.* 100. See, however, the opinion of DAVIES, J., in *People v. Canal Appraisers*, 33 N. Y. R. 461.)

Upon this distinction is based a very important rule relating to the ownership of the bed of the stream, and the right of fishery in its waters, to wit: that navigable or tidal rivers, so far as the tide ebbs and flows in them belong to the king, or in this country to the State; and rivers not navigable, that is fresh water rivers, belong to the owner of the adjacent soil. This distinction has no reference however to the right to use the stream for the purposes of passage or transportation; the rule in that respect being that the public have not only a right to all tide waters, but also a right of way or easement paramount to the right of the riparian proprietors in all rivers which, though not tidal or navigable in the sense of the former rule, are navigable in fact. (*Id.* *Morgan v. King*, 35 N. Y. R. 458.) In the latter case, or above tide water, the public right is one of passage and nothing more, as in a common highway. It is called by the cases an easement; and the owner of the adjoining land has a right to use the land and water of the river in any way not inconsistent with the easement. If he make any erection rendering navigation inconvenient or unsafe, he is guilty of a nuisance; and this is the only restriction which the law

imposes on him. (*Ex parte Jennings*, 6 Cow. 527; *Commissioners, etc. v. Kempshall*, 26 Wend. 413.)

By the common law, also, a river is, in fact, navigable, on which boats, lighters or rafts may be floated to market. (*Hale, De Jure Maris; Commissioners, &c. v. Kempshall* 26 Wend. 413.) But this rule of the common law as to what degree of capacity renders a river navigable in fact, should be received in this country with such modifications as will adapt it to the peculiar character of our streams, and the commerce for which they may be used. We have many streams of considerable extent not navigable by boats, lighters or rafts, but capable of floating to market single logs or sticks of timber. In many cases large tracts of land bordering upon their banks were originally covered with dense forests, the valuable products of which would have had no avenue to market, if the public easement in the streams had been restricted to navigation by boats or rafts. The true rule is, that the public have a right of way in every stream which is capable in its natural state and its ordinary volume of water, of transporting, in condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks. It is not essential to the right, that the property to be transported should be carried in vessels, or in some other mode, whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Nor is it necessary that the stream should be capable of being thus navigated against its current, as well as in the direction of its current. If it is so far navigable or floatable, in its natural state and its ordinary capacity, as to be of public use in the transportation of property, the public claim to such use ought to be liberally supported. (*Morgan v. King*, 35 N. Y. R. 454; *Shaw v. Crawford*, 10 John. 236.)

Nor is it essential to make a stream a public highway

that the capacity of the stream as above defined should be continuous, or in other words, that its ordinary state, *at all seasons of the year*, should be such as to make it navigable. If it is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. (*Id. Browne v. Chadbourne*, 31 *Maine* 9, See, however, *Munson v. Hungerford*, 6 *Barb.* 265; *Curtis v. Keesler*, 14 *Barb.* 511.)

But this is extending the principle quite far enough. And where it appeared that a stream was not capable of floating even single logs, except during seasons of high water, which were about two months in a year, and that then the logs, so floated, had to be aided in their passage by men in skiffs or on shore; that the current was so broken and impeded by rapids and rocks, that the logs were sometimes badly injured, and the ends were always more or less bruised up; and that the stream was used only occasionally for floating logs, etc., the Court of Appeals decided that such stream was not, in its natural state, a public highway, even within the liberal rules above laid down. (*Morgan v. King*, 35 *N. Y. R.* 460.)

The Hudson river, where in fact navigable above tide-water, is a public highway, though not declared so in the act declaring certain rivers highways. (*Palmer v. Mulligan*, 3 *Caines*, 307.) So, the waters of the Albany basin, as well as the navigable waters of the river are a public highway. (*Hart v. Mayor of Albany*, 3 *Paige*, 213; *S. C. aff'd*, 9 *Wend.*, 571.) So it was declared that, the Battenkill, in the county of Washington, though not enumerated in the statute declaring certain rivers and streams public highways (*Ses. 24, c. 186*,

§ 34), yet having been used as such, by the public for the purpose of rafting down boards and timber for more than 26 years, the usage had created a public right; and that an action would lie against the owner of a mill-dam for so obstructing the navigation as to injure the raft of the plaintiff, in passing over. (*Shaw v. Crawford*, 10 John. 236.) A river which is declared by statute a public highway, is such only for the purposes of navigation, and is not such highway in places where it is not in fact navigable. (*Mayor of Rochester v. Curtiss, Clark*, 336.)

It was said by Sir Matthew Hale, in his treatise *De Jure Maris*, that, "if any person at his own charge, makes his own private stream to be passable for boats or barges, either by making of locks or cuts, or drawing together other streams; and hereby that river which was his own, in point of propriety, become now capable of carriage of vessels; yet this seems not to make it *juris publici* (or a highway); and he may pull it down again, or apply it to his own private use. For it is not hereby made to be *juris publici* unless it were done at a common charge, or by a public authority; or that by long continuance of time, it hath been freely devoted to a public use." And the same principle has been confirmed in this country to the effect that if a person be the owner on both sides of a water course, and at his own expense makes it boatable by artificial means, it does not thereby become public; it is still private property and cannot be infringed, even by the Legislature, without compensation being made. (*Wadsworth v. Smith*, 2 Fairf. (Me.) R. 278.)

The public have likewise a right to travel on a public river on the ice; and, therefore, if any one cuts holes through the ice upon or near the place where there has been a *winter-way* for twenty years, he is liable to the payment of all damages sustained thereby, by those travelling

upon such way, without carelessness or fault on their part. (*French v. Camp*, 6 *Shepl. (Me.) R.* 438.)

The Legislature of a State cannot, by declaring a river navigable, which is not so in fact, or by nature, deprive the riparian owners of their rights to the use of the water for hydraulic and other purposes, without rendering compensation. (*Walker v. Board of Public Works*, 16 *Ohio*, 540.) Nor has the State a right, without compensation, to destroy the property of individuals situated upon rivers above tide waters, in making waters navigable which are not so by nature, or to appropriate such waters to the public use by artificial erections or improvements. (*Per Chancellor and Senator Allen in Canal Commissioners v. The People*, 5 *Wend.* 423. See *Canal Appraisers v. People*, 17 *Wend.* 571 ; *Commissioners, &c., v. Kempshall*, 26 *Wend.* 404.)

The public have no highway along the margin of navigable rivers and lakes, unless the same has been acquired by express grant or prescription. (*Ledyard v. Ten Eyck*, 36 *Barb.* 102.) Nor has the public a free access to wharves and buildings, erected under authority granted by statute, on the margin of a navigable river. It does not follow from the river's being a highway, that land appropriated from its bed must remain a highway. (*Wetmore v. Atlantic White Lead Co.*, 37 *Barb.* 70.)

CHAPTER II.

CONCERNING THE FEE IN HIGHWAYS.

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| 1. Rights of the owner of the fee. | 5. Carrying on business in highway. |
| 2. Depasturing highways. | 6. Presumption from adjacent ownership. |
| 3. How far public may use highways. | 7. Boundaries by highways. |
| 4. Concerning the fee in turnpikes,
railroads, &c. | 8. Boundaries by rivers. |
| | 9. What rivers are navigable. |

1. RIGHTS OF THE OWNER OF THE FEE.

A highway, though common to all people, is said to be nothing but an easement on the lands over which it passes. The public have no other right in it than the right of passage, with the powers and privileges incident to that right; such as digging the soil and using the timber and other materials found within the space of the road, in a reasonable manner, for the purpose of making and repairing the road and its bridges. The owner of the soil still retains his exclusive right in all the mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the public right of way. The person in whom the fee of the road is, may maintain trespass or ejectment, or waste, in regard to the same; and, upon the discontinuance or abandonment of the right of way, the entire and exclusive property and right of enjoyment revert in him. (*Jackson v. Hathaway*, 15 *John.* 447; *Carpenter v. Oswego, &c. R. R. Co.* 24 *N. Y. R.* 655; 2 *Str.* 1004; 1 *Burr.* 133; 11 *East.* 51.)

While this rule as to the extent of interest which the public acquire in highways is strictly true as to highways in the country, it must be taken with some limitation as to the streets of a city or large village. There are certain

uses, such as the construction of sewers and the laying of gas and water pipes, to which the latter are generally applied. These—called urban servitudes—are the necessary incidents of streets in large cities, and are paramount to the rights of the owner of the fee. Whether the streets be laid out and opened upon property belonging to the corporation, or whether they become public streets by dedication, or by grant, or upon compensation being made to the owner of the fee, they have all the incidents attached to them which are necessary to their full enjoyment as streets; and the corporation has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways. (*Milbau v. Sharp*, 15 Barb. 210, per EDWARDS, P. J.; *People v. Kerr*, 27 N. Y. R. 202.) But see *Kelsey v. King*, 33 How. 39. With regard to the streets of New York, it is held that the fee in the soil of all such as have been opened under the provisions of the acts of 1807 and 1813, vests in the corporation for public use. (*Hoff. Treatise*, 289; *People v. Kerr*, 27 N. Y. R. 188; *Drake v. Hudson River R. R.* 7 Barb. 508.)

It is the established inference of the common law that the owners of the lands adjoining a highway, either in the city or country, are the owners of the fee of the highway, as well as the waste land bordering thereon. But this inference may be rebutted or narrowed by evidence, for it is quite possible, as we shall hereafter see, for one man to own the adjoining land and another the fee of the highway. (*Bissell v. N. Y. Central R. R. Co.* 23 N. Y. R. 61; *Wager v. Troy Union R. R. Co.* 25 N. Y. R. 529; 3 Kent. 434; *Grose v. West*, 7 Taunt. 39; 2 Stark. N.P. 463.)

< The title of the owner of the fee is absolute, subject only to the public easement; and he may use the land in any way not inconsistent with this easement. He may

sell the land through which the highway runs, without subjecting himself to an action for a breach of covenant of seisin and right to convey, contained in the deed of conveyance, since the seisin and right to convey still continue in him. (*Whitbeck v. Cook*, 15 *John*. 483.) He may, also, have an action of trespass against any person who exclusively appropriates the soil, or who digs up the soil, or cuts down the trees growing on the side of the road and left there for shade or ornament (3 *Kent*. 433; *Gidney v. Earl*, 12 *Wend*. 98; *Willoughby v. Jenks*, 20 *Wend*. 96); or against one who stands in the highway opposite his land and uses abusive language towards him. (*Adams v. Rivers*, 11 *Barb*. 390.)

So, he may maintain ejectment against any person appropriating it to private occupation. (*Goodtitle v. Alker*, 1 *Burr*. 133; *Carpenter v. Oswego, &c.*, *R. R. Co.* 24 *N. Y. R.* 655.) In the case of *Goodtitle v. Alker*, where the plaintiff brought an action of ejectment for land over which was a public right of way, it was objected by the defendant that the land being subject to an easement, the sheriff could not deliver possession. Lord Mansfield, C. J., said: "There is no reason why he should not have a right to all remedies for the freehold, subject still, indeed, to the servitude or easement. An assize would lie if he should be disseised of it; an action of trespass will lie for an injury done to it. I see no ground why the owner of the soil may not bring ejectment as well as trespass. It would be very inconvenient to say, that in this case he should have no specific legal remedy; and that his only relief should be repeated actions of damages for trees, mines, salt springs and other profits under ground. It is true, indeed, that he must recover the land *subject to the way*; but surely he ought to have a specific remedy to recover the land itself, notwithstanding its being subject to an easement upon it."

The owner of the fee may also carry water in pipes under the highway, or sink a drain or raceway, or any water-course beneath the highway, if he can so do it as not to deprive the public of their easement. It is a common practice for the owners of water-mills or sites for water-mills, to sink water-courses for the use of their mills in their own land under highways; but care must be taken to restore the way to a safe and passable condition by building a bridge or otherwise—since, if injury is sustained by any one, in consequence of the highway's being less safe or passable, the water-course will be regarded as a nuisance, and the owner liable for damages to the party injured, in the absence of *gross negligence* on his part. (*Dygert v. Schenck*, 23 Wend. 446; *Perly v. Chandler*, 6 Mass. 454.)

And, it is the duty of the one constructing the water-course, to keep the way over it in repair at his own expense; and, if he should neglect to do it, he may be indicted for the nuisance, and the nuisance abated, besides his liability to parties injured. (*Id.*, *Harlow v. Humiston*, 6 Cow. 191.) So, if the owner of the fee, without special authority, makes and continues a covered excavation, as an area, under a public street or highway, for private purposes, he is, in the absence of negligence in the party injured, responsible for all injuries resulting from the way being thereby less safe; and, the fact that the covering of the area was done by a contractor, who contracted to do the work properly, will be no defense to an action for damages. The owner of the area is bound to make and at all times keep the street as safe as it would have been, if the area had not been constructed. (*Congreve v. Smith*, 18 N. Y. R. 79.)

The general doctrine is that the public are entitled to the street or highway in the condition in which they placed it; and whoever without special authority materially

obstructs it, or renders its use hazardous, by doing anything upon, above or below the surface, is guilty of a nuisance, and, as in all other cases of public nuisance, individuals sustaining injuries from it, without want of due care, have a remedy by action against the author or continuer of the nuisance. And it makes no difference whether the fee of the street is in a municipal corporation or in the individual doing the act ; in either case the act of injuring the easement is illegal. (*Id. Wendell v. Mayor, &c., of Troy*, 39 Barb. 329, and cases.)

The owner of the fee of the highway may also remove the soil, or sell it to be removed, if it be done without injury to the highway, or to the ingress and egress of adjoining owners. (*Williams v. Kenney*, 14 Barb. 629.) In this case, the owner of the soil in a highway, sold P a bank of sand therein in front of the plaintiff's premises, stipulating, however, that P should not dig so as to injure the highway or the plaintiff's premises. P, in taking away the sand, dug down four or five feet below the surface of the ground for a distance of three rods opposite the plaintiff's land. The excavation was about eight feet from the plaintiff's fence and the earth had partially caved in, to within about four feet of the fence, but none of the plaintiff's earth, or fences, or improvements had been in the least disturbed. In delivering the opinion of the court, JOHNSON J. said, "If there was a bank of sand valuable for building purposes, any portion of which could be removed without prejudice to the public easement or the plaintiff's rights of ingress and egress, the defendant had a perfect right to remove it or sell it. He sold it, but was careful to stipulate that no more of it should be removed than could be done without injury to the highway, or to the plaintiff. If Pratt went on and committed a wrong, in violation of his stipulation, the defendant is not responsible. Pratt was not his servant or agent, or acting under

his authority while infringing on the plaintiff's rights. But I am of opinion that had the defendant himself done the act complained of, no action could have been maintained by the plaintiff."

The owner of the fee is entitled to all trees standing or lying on the land over which a highway is laid out, except such as may be necessary to make or repair the highway or bridges on the *same* land; (2 *R. S.* (5th ed.) 415; 18 *Eliz. B. R. cited* 11 *Jac. B. R.*) and he may maintain trespass against any person who shall cut down or injure such trees or timber, unless such person was duly authorized to cut them, and did cut them for the purpose of making or repairing the road or bridges on the same land as above provided. (*See Babcock v. Lamb*, 1 *Cow.* 238.)

2. DEPASTURING HIGHWAYS.

It is a well settled principle of the common law that the public have no right to depasture a highway, since the freehold and all its profits belong to the owner of the adjoining soil. (*Savage C. J.*, 3 *Wend.* 147; 16 *Mass.* 33.) In *Doraston v. Payne*, (2 *H. Black*, 527,) *Bro. Abr. Trespass*, pl. 131 was cited to show that the owner of the soil of a highway may bring trespass, if cattle do anything but merely pass and repass. And *Eyre, C. J.* and *Heath, J.* expressly called the right of passage along a highway an *easement*; and all the judges agreed that it would be trespass if cattle were found depasturing on a highway. It was an action of replevin, for taking the cattle of the plaintiff; and a plea was made in bar of the avowry of damage feasant, that the cattle, *being in a highway*, escaped through defect of fences. To this plea a special demurrer was put in, for that it did not show that the cattle were passing through and along the said highway. For if they were trespassing, then the defect of fences was no excuse. And the plea was decided to be faulty, because the cattle

would be trespassing if they did anything more than pass and repass; and, therefore, this fact being traversable, should be stated with certainty. This authority was confirmed in its fullest extent in the case of *Stevens v. Whistler*, (11 *East*. 51.)

But a different rule was formerly adopted in this State, for the courts held that the statute which empowered the electors of each town at their annual town meeting "to make rules and regulations for ascertaining the sufficiency of all fences in such town; and for determining the times and manner in which cattle, horses or sheep shall be permitted to go at large on highways," had made it lawful in towns where such regulations had been made, for cattle, horses or sheep to go at large on, and depasture the highways, and that the compensation paid the owner of the land, on laying out the highway, covered not only the easement of a public way, but also the right to depasture the same. (*Griffin v. Martin*, 7 *Barb.* 297; *Hardenburgh v. Lockwood*, 25 *Barb.* 9. See *contra White v. Scott*, 4 *Barb.* 56.) These decisions were based solely on the idea that the legislature had made it lawful for cattle to go at large on highways, and are, therefore, entirely superseded by the recent statute, which declares that "it shall not be lawful for any cattle, horses, sheep, swine or goats to run at large in any public street, park, place or highway in this State." (*Ses. Laws* 1867, p. 2036, § 1.)

We are, therefore, remitted to the common law rule that cattle cannot depasture the highways. (See *Holliday v. Marsh*, 3 *Wend.* 142.) In 22 *Edw. IV*, 8 pl. 24, it was said by one of the court, that if one drive a herd of cattle along the highway where trees, or wheat, or any other kind of corn is growing, if one of the beasts take a parcel of the corn, if it be against the will of the driver, he may justify; for the law will intend that a man cannot govern

them at all times as he would; but if he permitted them, or continued them, then it is otherwise.

3. HOW FAR PUBLIC MAY USE HIGHWAYS.

Since the public acquire no right in a highway other than the right of passage and the privileges necessarily incident to that right, it follows that they cannot use or authorize others to use such highway for any other purposes. This limitation, however, does not apply to cities; for there the public right is extended so as to authorize the use of streets for purposes of sewerage, for the distribution of light and water, and for the furtherance of public morality, health, trade and convenience, and reduces the interest of the owner of the soil to a naked fee of only nominal value. (*Millau v. Sharp*, 15 Barb. 210; *People v. Kerr*, 27 N. Y. R. 202; *White v. Cincinnati*, 6 Peters 432.) Subject to this easement of a public way, and to these urban servitudes in cities, the rights and interests of the owner of the fee remain unimpaired. In the case of *Sir John Lade v. Shepherd* (2 Stra. 1004), which was an action for trespass, it appeared that the place where the supposed trespass was committed, was formerly the property of the plaintiff who, some years before, built a street upon it, which had ever since been used as a highway; that the defendant had land contiguous, parted only by a ditch, and that he had laid a bridge over the ditch, the end whereof rested on the highway. It was insisted for the defendant, that by the plaintiff's making it a street it was a dedication of it to the public; and that, therefore, however he might be liable to indictment for a nuisance, yet the plaintiff could not sue him as for a trespass on his private property. The court remarked: It is certainly a dedication to the public, so far as the public has occasion for it, which is only for a right of passage. But it never was understood to be a transfer of the absolute property in the soil. So the plaintiff had judgment. (*See also 2 Inst.* 705.)

It is clear that the Legislature has no power to authorize any individual, company or corporation to enter upon and appropriate the highway, for purposes other than those to which it has been originally dedicated, without providing a just compensation therefor. (*Presbyterian Society, &c., v. Auburn, &c., R. R. Co.*, 3 *Hill* 567; *Williams v. N. Y. C. R. R. Co.*, 16 *N. Y. R.*, 97.) In accordance with this, it has been held that the laying of a railroad track in a highway imposes an additional burden upon the owner of the fee and is a taking of property, within the meaning of the constitutional provision which forbids such taking without compensation. The company can, therefore, derive no title under acts of the Legislature, unless provision is made for the appraisal and payment of damages in the mode provided by law. (*Wager v. Troy Union R. R. Co.*, 25 *N. Y. R.* 526; *Carpenter v. Oswego, &c., R. R. Co.*, 24 *N. Y. R.* 655; *Mahon v. N. Y. Central R. R. Co.*, *id.* 658.) Such use of the street, without acquiring the title of the owner of the fee, or his license, is a continuing trespass, and such owner may maintain ejectment to recover the land, subject to the public easement as a highway. (*Wager v. Troy Union R. R. Co.*, *supra.*)

So the Legislature cannot, by declaring a river a public highway which is not in fact or by nature navigable, deprive the riparian owners of their rights to the use of the water for hydraulic and other purposes, without rendering compensation. (*Walker v. Board of Public Works*, 16 *Ohio*, 540.) Nor has the State a right, without compensation, to destroy the property of individuals situated upon rivers above tide water in making waters navigable which are not so by nature, nor to appropriate such waters to the public use by artificial erections or improvements. (*Per Chancellor, and per Senator Allen in Canal Commissioners v. People*, 5 *Wend.* 423; *see Canal Appraisers v. People*, 17 *Wend.* 571; *also* 26 *Wend.* 404.)

4. CONCERNING THE FEE IN TURNPIKES, RAILROADS, &c.

Turnpike roads, plankroads and railroads, like ordinary highways, are, as a general rule, simple easements, the fee remaining in the owner of the soil, and, upon their abandonment, reverting without further incumbrance. During the existence of such road, the rights of the owner of the fee are subject to the same rule as in case of ordinary highways. (*People v. White*, 11 Barb. 26; *Hooker v. Utica, &c. Turnpike Co.* 12 Wend. 371; *Worcester v. Western R. R. Co.* 4 Met. 564; *Haswell v. Vermont Central R. R. Co.* 23 Vt. 228.)

In the case of *Davidson v. Gill*, Lord Kenyon held, that the trustees of a turnpike road had not the soil thereof vested in them, so as to be enabled to give a sufficient consent to the diverting of a public footpath into their highway. His lordship observed, "the soil was not vested in them, but remained in the persons who were entitled to it before the act passed, by which they were appointed. The trustees have only the *control* of the highway. (See 1 *East*. 69.) Trespass lies against a servant of a turnpike company for plowing on the road, unless it be done for the repair of the road. (*Adams v. Emerson*, 6 Pick. 57; *Robbins v. Borman*, 1 Id. 122.) But it is an elementary principle of the law that where a power, right or thing is granted, either to a natural or artificial person, all the incidents are granted which are necessary to the enjoyment of the power, right or thing; and it has, accordingly, been held, that a turnpike company have not only the right to use the road for the purposes of travel, but may make such use of the land below the surface as may be necessary to secure and maintain the proper enjoyment of their franchise; that they may sink posts in the earth for the gate to swing on, excavate the soil to drain the road, and it was even thought that they might place their toll-house in the road, and dig a cellar,

well, etc., under the restriction that the highway be not too much straightened. (*Tucker v. Tower*, 9 *Pick.* 109; *Bridge Turnpike Co. v. Stower*, 2 *W. & Serg.* 548.)

While the interest of incorporated companies in turnpike roads, plankroads and railroads, is usually nothing more than an easement, it is not clear that they may not, under some circumstances, become vested with the fee of the soil. In the case of *The People v. White*, (11 *Barb.* 26,) the land in question had been taken in pursuance of an act of the Legislature, for the construction of a canal, and after having been used as the bed of the canal for a number of years, was abandoned by the State, and the canal located in a different place. The court held, in a very able and well-considered opinion, that such land, when no longer necessary for public use, reverted to the original owner, although the act under which it was taken declared it should vest in the State, in fee simple. (See also the cases cited by O'Connor, counsel for the appellants in *Heyward v. Mayor, &c. of New York*, 7 *N. Y. R.* 314.) But in *Heyward v. The Mayor of New York*, (*supra* and 8 *Barb.* 486,) where lands had been taken by the corporation of New York, in fee simple, under authority of Legislature for the extension of an alms-house, and had been used as such for twenty-seven years, and then the alms-house had been removed to another site, the Court of Appeals held, that there was no reversionary estate in the representatives of the original owner, and that the corporation might sell such lands to private individuals. The case of *The People v. White*, was neither cited nor alluded to. It may be safely said, that this case is distinguishable from those of turnpikes, plankroads, and railroads, inasmuch as either of the latter is bound as a condition of its existence, to continue the road for the public use, and when it ceases from abandonment or otherwise to be a company, the title must, from necessity,

vest in some one else, and it would seem reasonable that it should revert to the original owner. The cases bearing upon the question of reversion in such cases may be found in the points of the Hon. Charles O'Connor, counsel for appellants in *Heyward v. Mayor, &c.*, cited above.

5. CARRYING ON BUSINESS IN HIGHWAY.

The right of the public to an uninterrupted passage in a highway being paramount to the owner's rights in the soil, it will be unlawful for him to carry on any part of his business therein to the annoyance of the public. A temporary occupation, however, of a part of a street or highway, by persons engaged in building, or in receiving or delivering goods from stores or warehouses, or the like, is allowed from the necessity of the case; but a systematic and continued encroachment upon a street, though for purposes of carrying on a lawful business, is unjustifiable. (*People v. Cunningham*, 1 *Denio*, 524.)

The necessity to justify such temporary occupation need not be *absolute*; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure; but inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle a merchant may have his goods in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. (*Commonwealth v. Passmore*, 1 *Serg. & Rawl.* 219.) So, one who has occasion to leave a load in a highway must remove it with promptness. If he lets it remain there an unreasonable length of time, it may be

removed as a nuisance. (*Northrop v. Burrows*, 10 Abb. 365.)

6. PRESUMPTION FROM ADJACENT OWNERSHIP.

The presumption of law is that the owners of lands adjoining a highway, either in the city or country, are the owners of the fee of the highway. (*Bissell v. N. Y. Central R. R. Co.* 23 N. Y. R. 61; *Wager v. Troy Union R. R. Co.* 25 N. Y. R. 529.) If one man own the lands bordering both sides of the highway, then he is presumed to own the fee of the whole road; but if different owners own the lands on the different sides, then each is presumed to own to the center of the way—*ad medium flum viæ*. But where an adjoining owner enclosed a portion of the highway, which he continued to cultivate so enclosed, for twenty-eight years, it was held that even on the supposition that the public easement was thereby discharged, the line of separation between the opposite proprietors remained as it was previous to the enclosure, the center of the original highway. (*Watrous v. Southworth*, 5 Conn. 305; *Peck v. Smith*, 1 Conn. 127.) This presumption of ownership may, however, be rebutted, for one man may own the adjoining lands and another the soil of the road.

7. BOUNDARIES BY HIGHWAYS.

It is likewise a presumption of law that a conveyance of lands, bounded on a highway, carries with it the fee to the centre of the road as part and parcel of the grant. The idea of an intention in the grantor to withhold his interest in a road to the middle of it, after parting with all his right and title to the adjoining land, is never to be presumed. It would require an express declaration or something equivalent thereto, to sustain such an inference; and it may be considered as the general rule, that a grant of

land, bounded upon a highway or river, carries the fee in the highway or river to the centre of it; provided the grantor at the time own to the centre, and there be no words or specific description to show a contrary intent. (3 *Kent*. 433; *Bissell v. N. Y. Central R. R. Co.*, 23 *N. Y. R.* 61; *Cortelyou v. Van Brunt*, 2 *John*. 357; *Jackson v. Hathaway*, 15 *John*. 447.) Whether the fee of the highway passes or not is purely a question of intention, to be ascertained in each particular case from the deed of conveyance, and by the localities and subject matters to which it applies. (*Webber v. Eastern R. R. Co.*, 2 *Metcalf* 151.) It cannot pass as incident or appurtenant to the bordering land, since it is in itself a distinct and separate parcel of land. (*Jackson v. Hathaway*, 15 *John*. 447.)

Where a farm is bounded *along* a highway, or *upon* a highway, or *by* a highway, or *running to* a highway, there is reason to infer that the parties meant to the middle of the highway, and the grant will be so construed. (*Id. Child v. Starr*, 4 *Hill*. 369; *Hammond v. McLachlan*, 1 *Sandf.* 323; *Herring v. Fisher*, *id.* 344.) But if the words describing the boundaries are *by the side of*, or *by the margin of*, or *by the line of* a highway, or by other equivalent expressions, the fee of the highway is not included. (*Id. Jones v. Cowman*, 2 *Sandf.* 234.) A line not described as running on a street, but which in fact does, by courses and distance run along the side of a street, is to be held to convey the land to the centre of the street, as if the line were described, in words, as running along the street. The road or street, though not mentioned, is in the nature of a monument, which controls the courses and distance. (*Sizer v. Devereux*, 16 *Barb.* 160.)

A conveyance of city lots bounded on a piece of land laid down and designated in a map of such lots, as a street, which lots were sold with reference to such map, carries the grantee to the centre of such projected street, although

it never was adopted as a street by the public authorities. (*Bissell v. N. Y. Central R. R. Co.*, 23 *N. Y. R.* 61; *Hammond v. McLachlan*, 1 *Sandf.* 323.) In the case of *Bissell v. N. Y. Central R. R. Co.*, the conveyances of the lands in question were executed by M, the original proprietor, to different individuals, and described the lots invariably by their numbers; "reference being had to the allotment and survey by Elisha Johnson." In some cases the size of the lot was given, "being 33 feet front and rear and 99 feet deep." There was no express mention of any street in any of the deeds. It appeared that before selling any of the lots, the said M placed his map in the hands of agents engaged in selling his lots, and that they made sales in reference to the map. On this map the lands in controversy were laid down as "Erie street," and the lots conveyed, lay on both sides of such street. The question before the court was stated by the judge delivering the opinion, to be whether a conveyance of a lot bounded on a piece of ground thus laid out upon the map as a street, and called a street, but which was not in fact a public street or highway, carried the grant to the middle of the street. The court held that it did; and that the same rules of construction were to be applied to grants bounded by city streets as were applied to those bounded by highways in the country.

There is a class of cases called the New York City Street Cases (4 *Cow.* 542; 1 *Wend.* 262; 2 *Id.* 472; 1 *Hill*, 189; 8 *Wend.* 85; 11 *Id.* 486; 17 *Id.* 650; 18 *Id.* 411; 19 *Id.* 128), which seem to assume that a different construction should be put upon such conveyances of city lots bounded by a projected street; but in none of them is it distinctly decided as between grantor and grantee, that the former retains any title to the lands within the line of the street. (See as to these cases, OAKLEY, C. J., in *Hammond v. McLachlan*; *Bissell v. N. Y. Central R. R.*

Co. supra.) Yet, it would seem that in grants of city lands, where there are nice measurements and small and exact quantities, which are more definite in respect of intent than by clear inference, the soil of the street may be excluded. (*Tyler v. Hammond*, 11 *Pick.* 193; *Union Burial Ground v. Robinson*, 5 *Whart.* 21.)

8. BOUNDARIES BY RIVERS.

It is a well-settled principle of the common law, that the same rules apply in the construction of a grant bounded by a river not navigable, as are applied to grants bounded by a highway. (3 *Kent*, 432; *Child v. Starr*, 4 *Hill*, 369; *Commissioners of Canal Fund v. Kempshall*, 26 *Wend.* 404.) It is said by Sir Matthew Hale, in his justly celebrated treatise, *De Jure Maris*, that "fresh rivers, of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil; and, consequently, the right of fishing, *usque filum aquæ*; and, the owners of the other side, the right of soil or ownership, and fishing unto the *filum aquæ* on their side; and, if a man be owner of the land of both sides, in common presumption, he is owner of the whole river." "But special usage may alter that common presumption, for one man may have the river and another the soil adjacent." The right of soil of owners of lands bounded by the sea, or on navigable rivers, where the tide ebbs and flows, extends, however, only to highwater mark; and the shore below and the bed of the stream belong to the State as trustee for the public. (3 *Kent*, 427.)

The presumption is, that the riparian proprietor is the owner of the *alveus*, or bed of the river adjoining his land, if it be not navigable, to the middle or thread of the stream, and a grant of land bordering such river is, in the absence of express terms of limitation, presumed

to convey *usque filum aquæ*, or to the thread of the stream. (3 *Kent*, 427; per Chancellor and per ALLEN, in *Canal Commissioners v. People*, 5 *Wend.* 423.) Thus, where the boundary is *to a river*, or *along a river*, or *by a river* or any other equivalent expression, the grantee takes to the center or thread of the stream. (*Child v. Starr*, 4 *Hill*, 369; per WALWORTH, Chancellor; see cases cited in *Ex parte Jennings*, 6 *Cow.* 544.) So, running to a monument standing on the bank, and thence running *by the river*, or *along the river*, &c., does not restrict the grant to the bank of the stream, for the monument in such case is only referred to as giving the direction of the lines to the river, and not as restricting the boundary on the river bank. (*Id.*) So, a boundary line running from a post on the north bank of a creek, "thence down the same and along the several meanders thereof to the place of beginning," or "from a stake standing on the bank of a river, thence running along the river as it winds and turns to the place of beginning," which is also on the bank, includes the bed of the stream to the centre. (*Seneca Nation v. Knight*, 23 *N. Y. R.* 498; *Luce v. Carley*, 24 *Wend.* 451; *Jackson v. Low*, 12 *John.* 252.)

But there can be no doubt of the right of the general owner of the bed of a river, and of the adjoining lands, so to limit or restrict his conveyance of the one, as not to divest himself of his property in the other. He may sell the adjoining land and reserve to himself the bed of the stream; or he may convey the bed of the stream separate from the land which bounds it. (3 *Kent.* 434; *Child v. Starr*, 4 *Hill*, 369; *Hale's De Jure Maris.*) Thus, if the boundary is described as extending to the *shore*, or *bank*, or *margin*, or to high water mark, the bed of the stream will not be included. (*Child v. Starr*, 4 *Hill*, 369; *Halsey v. McCormick*, 13 *N. Y. R.* 296.) So, if the grantor, after giving the lines to the river, bound his land by the

bank of the river, or describe his line as running *along the bank* or *shore*, or *margin* of the river, he shows a clear intention of not carrying the grant to the center of the stream. (*Id.*) Thus, where the boundary was "to the Genesee river, thence northwardly along the shore of said river to Buffalo street," it was held that no part of the bed of the river passed. (*Child v. Starr, supra.*) So where the boundary was described as running *to the shore* of Gamaliel's Neck, and thence by the shore, etc., the bed of the stream was not included. (*Storer v. Freeman, 6 Mass. 435.*) So, a deed bounding the premises on the west by the east bank of a river entirely excludes the river. (*Kingman v. Sparrow, 12 Barb. 201.*) But where the boundary is fixed at the bank of a stream above tide water, the grant extends to *low water mark*. (*Halsey v. McCormick, 13 N. Y. R. 296.*)

9. WHAT RIVERS ARE NAVIGABLE.

We have before remarked that grants of land bounded on *navigable* rivers only extend to high water mark; while those bounded by rivers not *navigable*, in the absence of express words of limitation, extend to the thread or center of the stream. It is important in this connection to inquire what rivers are regarded as navigable. By the common law of England those rivers are navigable in which the tide flows and reflows; all others are not navigable. This distinction is only applied in determining the ownership of the bed of the stream, and has no reference to the right to use the stream for the purpose of passage or transportation; the rule in that respect being that the public have not only a right to all tide waters, but also a right of way or easement paramount to the rights of the riparian owners, in all rivers which, though not tidal or navigable in the sense above stated, are nevertheless

navigable in fact. (*Morgan v. King*, 35 N. Y. R. 458; *Hale, De Jure Maris; Ex parte Jennings*, 6 Cow. 518.)

It has been a question of much doubt in the courts of our State, as well as in the courts of other states, whether this common law definition of navigable and innavigable rivers was applicable to this country. On the one hand it has been held that it is applicable, and that the State owns the bed of those rivers only where the tide ebbs and flows; while on the other hand it has been held by equally high authority that the definition is not applicable, and that the State is the owner of the beds of all rivers that are navigable *in fact*.

As long ago as 1805, in *Palmer v. Mulligan* (3 Caines. 308), which was an action on the case for erecting and continuing a nuisance to the plaintiff's mills and dams, situated upon the Hudson, at Stillwater, KENT, Ch. J., who dissented from the majority of the court, said: "The Hudson, at Stillwater, is a fresh water river, not *navigable* in the common law sense of the term, for the tide does not ebb and flow at that place." "The Hudson, at Stillwater, is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses, such as that of rafting lumber, to which purpose it has heretofore been, and still is beneficially subservient. With this opinion THOMPSON J. agreed. SPENCER J., who delivered the controlling opinion, thought that the common law doctrine was not applicable, and that the bed of the river belonged to the State, but did not base his decision on that question. Again in *Shaw v. Crawford* (10 John. 236), the court acknowledged the definition as applicable. So in the *People v. Platt* (17 John. 195), which was an indictment against the defendant for obstructing the passage of salmon up the river Saranac, SPENCER Ch. J., after citing largely from Lord Hale's *De Jure Maris* and other English authorities, to show that only tidal waters are

navigable, says: "I cannot discover that these principles and distinctions have ever been denied or overruled; and I venture to say that they are of indisputable authority." And in *Hooker v. Cummings*, (20 John. 90,) the same learned judge held that rivers are to be considered navigable as far as the sea ebbs and flows. Again in *Ex parte Jennings*, (6 Cow. 518,) which was a motion for a mandamus to compel the Canal Appraisers to appraise the damages which Jennings—who was the owner of lands bordering on the Chittenango creek—had sustained, by reason of the diversion of the waters of said creek into the Erie canal above the lands of the relator, the court remarked, "By the term *navigable river*, the law does not mean such as is navigable in common parlance. The smallest creek may be so to a certain extent, as well as the largest river, without being legally a navigable stream. The term has, in law, a technical meaning; and applies to all streams, rivers or arms of the sea, where the tide ebbs and flows. A public grant, bounded on the margin of such waters, extends, by construction, no farther than high water mark, and leaves as to the rest, an absolute proprietary interest in the public. Above the flow of the tide, the river becomes private, either absolutely so, or subject to the public right of way, accordingly as it is a small or a large stream."

The next case, in point of time, in this State was that of *The Canal Commissioners v. The People*, (5 Wend. 423.) George Tibbits claimed to be the owner of a valuable waterfall in the middle sprout of the Mohawk river, which, in consequence of the erection of the State dam, above Troy, was overflowed and rendered useless. The Canal Appraisers refused to appraise the damages, on the ground assumed by them that he had not showed title to the premises; the Supreme Court issued a mandamus, and the Appraisers sued out a *writ of error*. The Court for the

Correction of Errors, by a vote of twenty to five, decided that from the facts in the case it did not appear that the middle sprout was embraced within the grant of the manor of Rensselaerwyck, by title under which the relator claimed the premises. The question, therefore, as to the application of the common law definition of navigable rivers, to our own country, did not arise directly; yet Chancellor WALWORTH and Senator Allen maintained that the rule of the common law, in that regard, prevailed here, while Senator Beardsley held otherwise. In *Varick v. Smith*, (5 Paige, 137,) Vice-Chancellor WILLIAMS held that it might be regarded as settled in this State that grants of land, bounded on rivers and streams above tide water, extend *usque ad filum aque*.

The case of Tibbits was again before the Court of Errors, in 1836, and is reported in 17 *Wend.* 571. The head note, which, it is claimed, expresses all the court actually decided, is in these words: "If, in the improvement of the navigation of a public river the waters of a tributary stream are so much raised as to destroy a valuable mill site situate thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws directing compensation to be made for private property taken for public use." Chancellor WALWORTH regarded the common law rule as applicable; but Senators Beardsley and Tracy, who wrote opinions, were of different mind. The same question had been ably examined by SUTHERLAND, J., when the case was before the Supreme Court, and his conclusion was that the common law rule was the law in this State. (13 *Wend.* 365.)

In *Varick v. Smith*, (9 Paige, 547,) the Vice-Chancellor of the fifth circuit was of opinion that the construction of the term "navigable river" had long been well settled, and

that it meant a river where the tide ebbed and flowed. He was also of opinion that the law, as laid down in the above case of *Tibbits* (17 Wend.), was restricted to and applicable only to the Mohawk river.

The next case worthy of attention, is that of *Starr v. Child*, (20 Wend. 149.) The action was ejectment, and the question was, whether a grant of land on the Genesee river extending to the river, and thence along the shore of said river, included the stream to the center. Judge COWEN, in the opinion of the court, reiterated the doctrine advanced by him in the note to *Ex parte Jennings*, (6 Cow. 518,) that in all grants bounded on fresh water rivers, the soil thereof passes, unless expressly excluded by the grant. Judge BRONSON, in his dissenting opinion, controverted this doctrine, and held, that all rivers, navigable in fact, belonged to the public.

The case of *The Commissioners of the Canal Fund v. Kempshall*, (26 Wend. 404,) is a leading case, and was thought by Chancellor WALWORTH (4 Hill, 372) to settle the question in this State. It was an action to recover damages for the obstruction, by the agents of the State, of the waters of the Genesee river at Rochester. The head note is in these words: "Fresh water rivers, to the middle of the stream, belong to the owners of the adjacent banks. If *navigable*, the right of the owners is subject to the servitude of the public interest for passage or navigation. The owners, however, are entitled to the usufruct of the waters flowing in the rivers, as appurtenant to the fee of the adjoining banks, and for an interruption in the enjoyment of their privileges in that respect, in consequence of public improvements made by the State, are entitled to compensation for damages sustained." Senator Verplank, who delivered the only opinion reported, insisted that the principle adopted here did not conflict with the decision in *The Canal Appraisers*

v. *Tibbits*, (17 *Wend. supra.*) as there were facts and circumstances in that case, upon which the decision may well be sustained, which did not exist in the case before him.

In *Child v. Starr*, which was brought up to the Court of Errors, and is reported in 4 *Hill*, 369, the question did not properly arise; but it was thought by the Chancellor that the above case of *Kempshall* had settled the rule here. The next case was that of *The People v. Tibbetts*, (19 *N. Y. R.* 523,) which was an action for rent reserved by a lease of one-half the surplus waters of the Hudson river at the Troy dam, executed by the Canal Commissioners to George Tibbits, the father of the defendant. The defense was, that George Tibbits, being owner of the lands bordering the river when the lease was executed, was owner of the surplus water mentioned; and, hence, the lease was without consideration. The court held, that the defendant, being in possession as tenant, could not contest the title of his landlord. The question as to what shall constitute a river navigable, was discussed, and this proposition announced. "A river is considered as an arm of the sea, and, as such, navigable, so far as the tide rises and falls. That is the technical rule of early establishment, and of uniform and constant adherence." But the case being decided on other points, the remark is, of course, *obiter*.

The last case, where the question was directly at issue, is that of *The People v. The Canal Appraisers*, (33 *N. Y. R.* 461.) This was a proceeding by mandamus to compel the Canal Appraisers to assess the damages which the relator had sustained by the use and diversion of the waters of the Mohawk river, at Little Falls, for the purposes of the Erie canal. It was decided that the Mohawk is a navigable stream; and that the title to the bed of the river is in the people of the State. DAVIES J., who delivered the opinion of the court, after a most elabo-

rate examination of the English and American cases on the subject, concluded that the common law rules, determining what streams are navigable, are not applicable to this country. But, with all deference to the learned judge, we must regard the decision as restricted and applicable only to the Mohawk. That the Mohawk is not subject to the common law rule, was long before decided by the Court of Errors, in the case of *Tibbitts*, (17 *Wend.* 571.)

In *Morgan v. King*, (35 *N. Y. R.* 454,) the common law rule was acknowledged. The action was brought for obstructing the passage of saw logs of the plaintiff, in floating down the Racket river, near Potsdam. In delivering the opinion of the court, SMITH J. remarked: "By the common law of England, those rivers are navigable where the tide flows and reflows; all others are not navigable. Upon this distinction is based a very important rule relating to the ownership of the bed of the stream and the right of fishing in its waters, to wit: That navigable or tidal rivers, so far as the tide ebbs and flows in them, belong to the King; and rivers not navigable, that is fresh water rivers, belong to the owner of the adjacent soil." But as the Racket river was decided not to be navigable in fact, the question as to the application of this common law rule did not arise.

Such is the history of the decisions, in this State, on this interesting and important subject. References to the decisions of the courts of other States will be found in the note to page 427, of Kent's Commentaries, in the note to *Ex parte Jennings*, (6 *Cow.* 518,) and in the opinion of Judge DAVIES in *The People v. Canal Appraisers*, *supra*. It will be observed that the current of the decisions is in favor of the common law rule, and it is to be hoped that it may ultimately be firmly established as the law of the State. The learned commentator on American law, after noticing the decisions in other States confirming the com-

mon law doctrine as stated above, says: These decisions in the courts of Illinois and Mississippi, are highly creditable to their learning and firmness; and it is consoling to meet with such frank and manly support of the binding force of the common law on which American jurisprudence essentially rests. (3 *Kent.* 428, *note.*)

CHAPTER III.

HIGHWAYS BY DEDICATION.

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| 1. Definition and nature. | 5. Principles deduced from the decisions. |
| 2. Who may make dedication. | 6. How accepted by the public. |
| 3. How dedication proved. | 7. Dedication of bridges. |
| 4. How presumption of dedication rebutted. | 8. Effect of dedication. |

1. DEFINITION AND NATURE.

Highways usually originate either by dedication or by the acts of the proper public authorities, in pursuance of the statute. We will consider in this chapter some of the general principles relating to highways by dedication. Dedication may be defined to be an act by which the owner of the fee gives to the public an easement in his land. A road or street may become a public highway in consequence of a dedication of it by the owner of the soil to the public use. The only difficulty is in ascertaining what will be sufficient to constitute such a dedication. It is not essential that the dedication be in writing, but it may be done by an act *in pais*, as well as by deed. (*Hunter v. Trustees of Sandy Hill*, 6 *Hill*, 407.) It must originate in the voluntary donation of the owner of the land, and be completed by the acceptance of the public. (*Child v. Chappell*, 9 *N. Y. R.* 257.) The effect of a dedication is not to deprive a party of his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment, which the owner of property ordinarily has. He retains a right to use the land in any way compatible with the use to which it is dedicated. (*Id. Post v. Pearsall*, 22 *Wend.* 451; *Kelsey v. King*, 33 *How.* 39.)

The public acquire no more than the ordinary easement

of passage and repassage over the surface of the soil, and the rights and privileges incident thereto. (*Kelsey v. King*, 33 *How.* 39, and cases cited.)

2. WHO MAY MAKE DEDICATION.

In respect to who may dedicate lands to public uses, the rule seems to be the same as in making grants of any kind. It can only be done by one having the fee in the land. (*Ward v. Davis*, 3 *Sandf.* 502.) It cannot be done by a trespasser or a tenant. (*Washb. Ease.* 180.) Thus, where land as far back as living memory could go, had been used in all respects as a public street, yet, having been under lease for ninety-nine years, which had but just expired, Lord Chief Justice Abbott held that the permission of the tenant could not bind the landlord, and that there was no dedication unless it was proved to have been made prior to the giving of the lease. (*Wood v. Veal*, 5 *Barn. & Ald.* 454.) But it is decided that if there has been a frequent change of tenants during the period when the public have had the use of the way, or if the landlord be proved to have had *express* notice of the public being in the occupation of the way, his consent, as owner or the fee, must be implied, and the dedication will be complete. (*Rex v. Barr*, 4 *Campb.* 16.)

But under the statute of this State declaring that "all roads not recorded which have been, or shall have been, used as public highways for twenty years or more shall be deemed public highways" (1 *R. S.* 521, § 100), it has been held that the intention of the owner of the land is not material, and that such a user of lands for that period makes it a public highway under the statute, though the owner be a lunatic, an infant, or married woman, and has no knowledge thereof during the entire time. (*Devenpeck v. Lambert*, 44 *Barb.* 599, per BALOOM, J.)

The above was, however, wholly *obiter* and contrary to

the whole current of decisions both in this country and in England.

It is not necessary that there should be a grantee, as in the case of an actual grant, and a dedication will be valid without any specific grantee *in esse* at the time, to whom the fee could be granted. The public is an ever-existing grantee, capable of taking a dedication for public uses. (*Post v. Pearsall*, 22 Wend. 435; *Hunter v. Trustees, &c.* 6 Hill. 407.)

3. HOW DEDICATION PROVED.

A dedication is supposed to take place through a mutual agreement between the owner of the land and the public; therefore the consent of both these parties must be expressly or impliedly given. We will proceed to consider, 1. What is sufficient evidence of an intention to dedicate on the part of the owner of the soil; and 2. How far the consent of the public is requisite.

To constitute a dedication of land to public use, there must be an intention to do it on the part of the owner, and such intention must be clearly and satisfactorily proved. It may be manifested by writing, by declarations or by acts. As to what acts or omissions on the part of the owner are sufficient to constitute this dedication, is a question upon which no certain rules can be laid down as applicable to every case.

It is the province of the jury to decide from the circumstances of each particular case, whether there is sufficient evidence of an intention on the part of the owner to dedicate the land to the public use as a highway. (*Gould v. Glass*, 19 Barb. 195.) Where the acts by the owner are not so specific in their nature, or so determinate in their object, as clearly to prove his intention that the public should acquire a right of way, they are frequently aided by collateral evidence; and the circumstances of most

common occurrence, which is considered sufficient to support the claim of the public, is the length of time during which they have had the uninterrupted use and enjoyment of their privilege. But, of course, the weight of this as of any other evidence, must depend, in each instance, on the particular feature of the case. Nor has any certain period been prescribed as necessary to support a dedication. In some of the English cases, six years; in others, eight and twelve years have been held sufficient, while in another case, nineteen years was held insufficient.

The true principle to be deduced from the authorities is, that if there be no other evidence of a grant or dedication, than the presumption arising from the fact of acquiescence on the part of the owner, in the free use and enjoyment of the way as a public road, the period of twenty years, applicable to incorporeal rights, would be required, as being the usual period of limitation. (3 *Kent*, 451; *Gould v. Glass*, *supra*.) But if there were clear, unequivocal and decisive acts of the owner, amounting to an explicit manifestation of his will to make a permanent abandonment and dedication of the land, those acts would be sufficient to establish the dedication within any intermediate period, and without any deed or other writing. (3 *Kent*, 451; *Irwin v. Dixon*, 9 *How.* (U. S.) 30.) Thus, if a man builds a double row of houses, opening into an ancient street, at each end, making a street, and sells or lets the houses, that is *instantly* a highway. (*Woodyer v. Hadden*, 5 *Taunt.* 137.) So, if one make a plan of his land in a city, with certain streets laid down between certain lots, and sells the lots accordingly, a dedication of such streets will be presumed. And, more particularly so, if the public are allowed to occupy the streets accordingly. But a mere survey of such streets, without selling the contiguous lots or letting the streets be occupied, is not

enough. (*Irwin v. Dixon*, 9 *How.* (U. S.) 31; *Clements v. West Troy*, 16 *Barb.* 251.)

In the case of *Sir John Lade v. Shepherd*, (2 *Stra.* 1004,) it appeared that the owner of the property had some years before *built a street upon it*, which had ever since been used as a highway, and the court held it a dedication. In *Rex v. Lloyd*, (1 *Campb.* 260,) the *locus in quo* was a narrow, oblong passage leading from one part of the street to another, without having any outlet elsewhere; the houses all the way round had once belonged to the same individual, and the passage had been opened as far back as could be remembered. Lord Ellenborough observed: "If the owner of the soil throws open a passage, and neither marks, by any visible distinction, that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it, after being allowed to use it so long without any interruption." In the well known case of *Rugby Charity v. Merryweather*, (11 *East.* 375, *note*,) the period of eight years was held to be a sufficient length of time, whereon to presume a dedication. Lord Kenyon said: "It is now too late to assert the right; for this is quite a sufficient time for presuming a dedication of the way to the public. In a great case, which was much contested, *six years* was held sufficient." This decision has, however, been much questioned in subsequent cases.

In the case of *Rex v. Hudson*, (2 *Stra.* 909,) user for four years was considered too short a period. In *Woodyer v. Hadden*, (5 *Taunt.* 125,) the language of the court was that time was a material ingredient in the foundation of the presumption; and nineteen years' use of a street for a public highway was held not to be clear and decisive, and, therefore,

not sufficient evidence of a dedication of it to the public. But in the case of *Regina v. Patrie*, (30 *Eng. Law & Eq. R.* 207,) the court goes so far as to say, that the enjoyment and user of a way by the public, with circumstances of publicity, for a period of six years, is evidence from which the assent of the owner, whoever he may be, is *prima facie* to be inferred. In a recent American case it was held that, in the absence of clear and unequivocal manifestation of an intention to dedicate, a dedication would not be presumed, until after the lapse of twenty years' uninterrupted user, and this is the view generally taken by the courts of this country. (*Hoole v. Attorney General*, 22 *Ala.* 190.)

In *Colden v. Thurber*, (2 *John.* 424,) twelve years' use was held *prima facie* evidence that the road had been properly laid out. In *Denning v. Roome*, (6 *Wend.* 651,) where a street in the city of New York was widened from forty to sixty feet, and accordingly used by the public for nineteen years, although no legal measures had been taken to divest the title of the owner, it was held, that the non-claim of the owner for such length of time, connected with his acts, such as the payment of an assessment for paving the street to the full width, and the recognition of the appropriation of the twenty feet, were sufficient to establish the right of the public to the use of the street to the full width of sixty feet.

So, where the owner of lands in a city makes a map or plan of his land, with certain streets laid down between certain lots, and sells the lots accordingly, a dedication, as between the grantor and grantee, will be presumed, although no part of such streets have been adopted by the public authorities. (*Bissell v. N. Y. Central Railroad Co.* 23 *N. Y. R.* 61; *Matter of Thirty-second street*, 19 *Wend.* 128; *Matter of Twenty-ninth street*, 1 *Hill*, 189; *Wyman v. Mayor of N. Y.* 11 *Wend.* 486.) But the mere laying down of streets or squares upon the plat

of a contemplated city or village, even though the same may be publicly exhibited or declared by the proprietors thereof, does not constitute a dedication of them to public use; there must be a sale of some of these lots, having reference to such streets or squares, and some adoption thereof by the public, as such, in order to create a dedication of them to the public. (*Thompson's Pro. Rem. and cases.*) So, where adjoining proprietors, for their own convenience laid out a lane twenty feet wide on the boundary line, and the public used it for about thirty years, it was held to be a dedication. (*Wiggins v. Tallmudge*, 11 Barb. 457.)

4. HOW PRESUMPTION OF DEDICATION MAY BE REBUTTED.

It seems, however, to be agreed, both by the English courts and the courts of this country, that the owner may negative any presumption of dedication, by placing at the entrance of the passage a bar, post, or gate, or notice of "no thoroughfare" or "private passage," or by other similar means. Thus, where a bar had been placed across a newly finished street, which bar, however, was soon knocked down, and the public used the street for some years as a thoroughfare, it was contended that a dedication, at least as far as a right of foot path, had been proved. Mr. Justice HEATH held, that the putting up of the bar rebutted the presumption of a dedication to the public; that the dedication contended for must have been made openly, and with a deliberate purpose, and the verdict negatived the right of way. (*Roberts v. Karr*, 1 Campb. 262, note.) So, where it appeared that a gate had been once erected across the *locus in quo*, but, that for twelve years, the public had used a way over the *locus in quo*, there being no gate during that period, Mr. Sergeant Marshall directed the jury to find against the right of way, and the court of King's Bench sustained his opinion. (*Lethbridge v. Winter*, 1 Campb.

263, *note*.) So, where a manufacturing company opened a street on their own premises, and built houses on each side and wrought the way as a street, and the houses were occupied by their operatives; and it appeared that they had posted up at the opening of the passage, "private way," it was held to be such only, and the city was not responsible to a person who, in passing through it, sustained injury. (*Durgin v. Lowell*, 3 Allen, 398.) So, where a land owner, in the village of Newburgh, laid out a strip of land of the ordinary width of a street, from one public street to another, and wrought it, at great expense, into the condition of a street fit for public use; when he began to work, he had gates at each end; he took down one as he progressed, and in the end removed the other; and while he was working it people on foot and in vehicles passed over it. After it was completed, he replaced the gates. A citizen of the town insisted on passing over it, on the ground that it had been dedicated to public use. The court held that it was not a dedicated highway. (*Carpenter v. Gwynn*, 35 Barb. 395, 406.)

5. PRINCIPLES DEDUCED FROM THE DECISIONS.

We see, therefore, that the question of dedication, as to the owner of the land is nothing more nor less than a question as to the intention of the supposed donor of the right of way. The owner's acts and declarations must be deliberate, unequivocal and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use; or else that there must have been a user of such length of time, by the public as will raise the presumption of acquiescence on the part of such owner, in the free use and enjoyment of the way as a public road; and that in the absence of other evidence of a grant or dedication, such user must have been for the period of twenty years; and further, that it is a question

for the jury to decide, on the evidence of each particular case, whether the facts show an intention to dedicate the *locus in quo* to public use. The intention is the point where the matter hinges; and it follows, that whenever the owner has done any act inconsistent with the public right of passage, or where any other circumstances occur which negative the implication of his assent, the dedication cannot be inferred.

6. HOW ACCEPTED BY THE PUBLIC.

To render a dedication complete or effectual, it must be accepted by the public: and before it has been accepted the owner is not precluded from revoking it at any time. (*Holdane v. Trustees, &c.* 21 *N. Y. R.* 478.) What acts on the part of the public will amount to an acceptance, so as to charge the town with the reparation, is not clearly settled by the courts.

The common law mode of indicating an acceptance by the public of a dedication is by a user of sufficient length to evince such acceptance—the length of time depending, of course, upon the circumstances of each particular case. (*Washb. Euse.* 139; *Lade v. Shepherd*, 2 *Strange*, 1004.) But courts of high authority, both in this State and in other States, influenced by local statutes, have held that mere user of streets or ways by the public does not constitute an acceptance or adoption of them as highways by dedication, unless there shall have been a location of the same, as public ways, by the proper officers of the town, city or county authorized to make such location.

Thus in *Underwood v. Stuyvesant*, (19 *John.* 186,) Petrus Stuyvesant had surveyed and laid out a tract of land within the city of New York into city lots and streets, and had sold or leased part of the lots with reference to the survey. Mr. Justice PLATT, in delivering the opinion of the court, said: "We must intend that every person knew

that these streets could not be established as *public streets* of the city unless they were sanctioned by the corporation, or other public agents having such powers." So in the case of *Clements v. West Troy*, the proprietors of that village laid out the same by a plan, upon which an alley was laid down, and house-lots were conveyed bounded on the alley. The court said: "As between the original proprietors and those to whom they conveyed, this act of the proprietors secured a right of way. But the alley thus designated, and in respect to which the purchasers had acquired an indefeasible right of way, did not thereby become a public highway. The dedication must be accepted. The highway must be laid out. Until that is done, the alley would remain the property of the original proprietors, subject to the right of way in those who had taken the deeds of lots bounded upon the alley." (16 Barb. 251. See also *Child v. Chappell*, 9 N. Y. R. 257, per MORSE, J., and to the contrary, *Clements v. West Troy*, 10 How. 199.)

In the case of the *Trustees, &c. v. Otis*, (37 Barb. 50,) it was held that a way may be dedicated, and will become a highway when laid out as such by the constituted authorities, or by an acceptance of the dedication by those authorized to act for the public. But it is not competent for an individual, by a simple act of dedication, to impose upon the public the burden and responsibility of maintaining a highway. Nor will the mere use of the way by the public make an acceptance, if for a less time than twenty years. Nor could the public prosecute the one who had dedicated it, for having shut it up before the same was accepted.

And in the case of *Oswego v. The Oswego Canal Company*, (6 N. Y. R. 257,) the Court of Appeals decided that streets and roads dedicated by individuals to public use, but not adopted by the local public authorities, or declared highways by statute, are not highways within the meaning of the highway act; and there is no law by which any one can be compelled to keep them in repair.

On the other hand, it was held by Mr. Justice WRIGHT, in *Clements v. West Troy*, (10 How. 199,) that user by the public was sufficient evidence of an acceptance of a dedication without any act of affirmance by any local officer or body. So, in *Bissell v. N. Y. Cent. Railroad*, (26 Barb. 634,) the court held, that the acceptance must be by some express corporate or official act, *or by user, distinct and unequivocal*, of such street as a public street or highway; and when the same case was before the Court of Appeals (23 N. Y. R. 64), the same proposition was affirmed by MASON, J., who delivered the opinion of the court, although it was admitted that the question did not arise in the case. Again, it was held in *Holdane v. Trustee, &c.* (23 Barb. 123,) by the other judges, against STRONG, J., that a dedicated way may acquire the character and qualities of a highway, if it has been openly used as such, though there has been no formal act of acceptance by the public authorities, and that it becomes a way for all persons. The same case came before the Court of Appeals in 1860, and is reported in 21 N. Y. R. 474; the court said, "It is not necessary that there should be any formal act of acceptance by the public authorities, but it may be indicated by common user, under circumstances showing a clear intent to accept and enjoy, as such, the easement proposed to be dedicated." All the judges concurred in affirming the judgment of the Supreme Court; SELDEN, J., with a protest against any implication that a dedication can take effect without some public body to take, or without an acceptance to be proved by user or otherwise. The case of *Oswego v. The Oswego Canal Co.* was neither cited nor referred to. (See also *Devenpeck v. Lambert*, 44 Barb. 596.)

Upon principle, it is difficult to see why a formal act of the public authorities, is requisite to affirm a dedication of a highway. All highways are for the benefit of the peo-

ple at large, in whatever part of the State they may reside. And though each town is bound to repair its own ways, yet the burden is the same upon all other towns; and there seems no reason why any one of them should be allowed a *veto* as to the establishment of new ways, which in the very user thereof by the public, are evidenced to be of general advantage. If a way be voluntarily travelled by the people at large, it must be presumed to be beneficial to them; if it be of benefit, the town should be charged with its reparation. The principle upon which the liability to repair highways is founded is, that the public shall be at the expense of keeping in good order their own ways. The highway officers are selected only as a means whereby that charge can be effected. Whenever a way has become a public way then the town must repair it as the agent for the people. The intervention of the town is not required until after the public nature of the way is established. That is done through its adoption by, and as a necessary consequence, its utility to, the people at large.

7. DEDICATION OF BRIDGES.

The general rules of dedication apply equally to highways and bridges; there is, however, this distinction between them. If a way be opened and dedicated to public use by the owner of lands, it is optional with the public to accept it by user, or not to accept it by non-user; but if a private bridge be built in a highway the passage over it is a matter of necessity, and not of choice. No one can traverse the highway without passing over the bridge; and it follows, that its user by the public is no evidence of their consent to its erection, nor any criterion of its utility. But if a bridge be of public utility and be used by the public, they are obliged to repair it, though built by an individual for his private benefit; it is otherwise, however, if built by him for his own benefit, and it is without public utility,

though used by the public. And if a bridge built by an individual, and dedicated to the community, is not what it seems to be, but is of imperfect and inartificial construction, the public may reject and indict it for a nuisance, after discovering the cheat, though their previous conduct might, under different circumstances, have amounted to an acceptance. (*Rex v. West Riding*, 2 *East*. 342.) And if a bridge is thrown over a highway, and the public derive no benefit from it greater than they enjoyed before it was built, the builder is bound to repair it. (*Dygert v. Schenck*, 23 *Wend.* 446. See *ante*, page 9.)

8. EFFECT OF DEDICATION.

The effect of a dedication is not to deprive the owner of his land, but to estop him while the dedication continues in force from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. He retains a right to use the land for any and all purposes compatible with the use to which it is dedicated. (*Hunter v. Trustees, &c.*, 6 *Hill.* 407; *Kelsey v. King*, 33 *How.* 39.)

In the case of an ordinary highway, all which the public acquire by a dedication is the right of passing and repassing over the surface of the soil, and such privileges as are incident thereto. All else remains in the original owner or his assigns, subject only to such easement. Every right of use and ownership, and every right of action for an interference with either which is not inconsistent with the free and common use of the highway, still belongs to the owner of the soil. If the highway is closed or the public rights are relinquished, the land at once reverts in full and entire dominion. (*People v. Kerr*, 27 *N. Y. R.* 196; *Kelsey v. King*, 33 *How.* 39.)

But this rule must be regarded as not strictly applicable to streets dedicated to public use in cities or large villages. As to such streets it is said, though not perhaps directly

decided, that whether they are acquired by grant, by dedication, or by purchase, they are subject to those uses which are incident to streets in cities; such as the construction of sewers and the laying of gas and water-pipes, without entitling the owner to additional compensation. (*Milbau v. Sharp*, 15 Barb. 210, per EDWARDS, J.; *People v. Kerr*, 27 N. Y. R. 202, per EMOTT, J.) But a different opinion was expressed by DAVIES, C. J., in *Kelsey v. King* (33 How. 39), to the effect that there was no difference between highways in the country and streets in cities in this regard, and that the dedication of land for a public street in a city or village, carries with it no other right or privilege than the ordinary easement of travel. That case was decided on other grounds, but the learned judge gives an elaborate review and analysis of the authorities, to show that the sewer commissioners of the city of Brooklyn had no power to construct a sewer in a dedicated street of that city, without acquiring title and making compensation therefor to the owner of the fee, or without his consent.

The owner may revoke the dedication at any time before it has been rendered complete by the acceptance of the public. (*Holdane v. Trustees, &c.* 21 N. Y. R. 478.) But where the dedication has been once accepted by the public, it cannot be revoked while the street continues in use. (*Adams v. Saratoga & Washington R. R. Co.* 11 Barb. 414.) The dedication of land to the use of the public as a highway, does not preclude the owner of the fees subject to the public easement from maintaining an action against a railroad company, which, without his consent, or an appraisal of his damages, enters upon and occupies such highway with the track of its road. (*Williams v. N. Y. Central R. R. Co.* 16 N. Y. R. 97.) Upon the discontinuance or extinction of the highway, in any manner, the land reverts in the owner of the fee discharged of the public easement or right of passage.

CHAPTER IV.

COMMISSIONERS, THEIR POWERS AND DUTIES.

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| <ol style="list-style-type: none"> 1. Election and qualification. 2. General powers and duties. 3. To cause roads to be ascertained, described and entered of record. 4. To cause the highways and bridges to be kept in repair. 5. To divide the town into road districts and assign inhabitants thereto. 6. To lay out and discontinue roads. 7. To account to town auditors. 8. In raising money for repairs of roads and bridges. | <ol style="list-style-type: none"> 9. To appoint overseers, and to prosecute them for neglect of duty. 10. Miscellaneous powers and duties. 11. Actions by or against. 12. May consent to use of highway by railroad company. 13. May agree with plank-road or turnpike company for use of highway. 14. Mandamus against. 15. Injunction against. 16. Fees of. |
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1. ELECTION AND QUALIFICATION.

It is provided by the Revised Statutes, (1 *R. S.* 340, *as amended in 1865, ch. 522,*) that there shall be chosen at the annual town meeting, among other officers, one or three commissioners of highways. Prior to the amendment, the overseers of highways were also to be elected at the same time and place. But by the act of 1865, the power of appointing overseers was conferred upon the commissioners of highways. Since there may be chosen one or three commissioners, where the word "Commissioners" is used, it is to be understood as though it read *commissioner or commissioners*. Highway commissioners can only be chosen by ballot. (1 *R. S.* 343.)

The person or persons chosen for commissioners must be electors of the town since it is provided that no person shall be eligible to any town office unless he shall be an elector of the town for which he shall be chosen. (1 *R. S.* 345.)

COMMISSIONERS, THEIR POWERS AND DUTIES. 61

To take oath.—Every person chosen to the office of commissioner of highways, before he enters on the duties of his office, and within ten days after he shall be notified of his election, shall take and subscribe before some justice of the peace, the oath of office prescribed in the sixth article (twelfth in the Constitution of 1846) of the Constitution of this State. (1 *R. S.* 345.) The oath is in these words:

“I do solemnly swear (or affirm, as the case may be) that I will support the Constitution of the United States, and the Constitution of the State of New York; and that I will faithfully discharge the duties of the office of *commissioner of highways*, according to the best of my ability.” (For form, see Appendix No. 1.)

Such oath shall be administered without reward, and the justice before whom the same shall be taken, shall also, without reward, certify in writing the day and year when the same was taken, and shall deliver such certificate to the person by whom the oath was made. (1 *R. S.* 345.) The oath may also be subscribed and sworn before the town clerk of the town in which such officer shall be elected. Such oath shall be administered and certified without fee or reward. (*Laws* 1838, *Ch.* 172.) (For form of certificate, see Appendix No. 2.)

The commissioner taking the oath, within eight days thereafter, shall cause the certificate to be filed in the office of the town clerk. (1 *R. S.* 345.) If any person chosen or appointed commissioner of highways shall not take and subscribe such oath, and cause the certificate thereof to be filed as above required, such neglect shall be deemed a refusal to serve. (*Id.*) But if he enter upon the duties of his office before he shall have taken such oath, he shall forfeit to the town the sum of fifty dollars. (1 *R. S.* 347.)

Penalty for Refusing to Serve.—So, if any person chosen or appointed to the office of commissioner of high-

ways shall refuse to serve, he shall forfeit to the town the sum of fifty dollars. (*Id.*)

Number and term of office.—The electors of each town shall have power at their annual town meeting, to determine, by resolution, whether there shall be chosen one or three highway commissioners, and the number so determined upon shall be balloted for and chosen; and if only one shall be determined upon and chosen, he shall possess all the powers and discharge all the duties of commissioners of highways as prescribed by law, and shall hold his office for one year. And whenever three commissioners shall be chosen in any town, they shall be divided by lot by the canvassers, upon the result of the canvass, into three classes, to be numbered one, two and three; the term of office of the first class shall be one year, of the second, two, and of the third, three; and one commissioner only shall thereafter annually be elected in such town, who shall hold his office for three years, and until a successor shall be duly elected or appointed; but in case any commissioner shall be elected to fill a vacancy, he shall hold the office only for the unexpired term which shall have become vacant; and if two vacancies shall be required to be filled, the canvassers shall, after the canvass, determine by lot as aforesaid, the terms they shall respectively hold.

Vacancy, how filled.—And when any vacancy shall happen by death, removal, resignation, neglect to qualify, or refusal to serve, it shall be supplied until the next succeeding annual town meeting by an appointment in writing, under the hands of any three justices of the peace, or two justices and the supervisor of the town. (See form No. 8.)

To administer oath.—And every commissioner of highways shall be authorized to administer oaths to any witnesses

or juries, in proceedings which may be had by or before them.

Number, how changed.—And whenever any town shall have determined upon having three commissioners, and shall desire to return two or have but one, such town shall have the power so to do by a resolution taken at an annual town meeting, and when such resolution shall have been adopted, no other commissioner shall be elected or appointed, until the term or terms of those in office at the time of adopting such resolution shall expire or become vacant; and they shall have power to act until their terms shall severally become vacant or expire, as fully as if the three continued in office. (*Laws of 1845, ch. 180, as amd. 1847, ch. 455.*)

If only one commissioner be chosen he shall hold his office for one year only; but if three be chosen, they shall hold respectively for three years, except the first set chosen, who hold, one for one year, one for two years and one for three years. After a resolution of a town determining to have three commissioners, the town may, by a subsequent resolution, determine to have but two or one; and if such resolution be adopted, no other commissioner shall be elected or appointed until the the term or terms of those already in office shall expire or become vacant.

Appointment to fill vacancy.—In case of vacancy, if the commissioner is *appointed*, he holds to the next annual town meeting after his appointment; but if he is *elected*, he holds for the unexpired term. Where two persons are appointed to fill vacancies in the office of commissioner of highways, without designating the class to which they shall respectively belong, the one first named in the appointment is to be regarded as appointed to the first class. Where the commissioners of the first and third class—that

is the one to serve one year and the one to serve three years—failed to qualify themselves, and the vacancies were filled by three justices of the peace, by appointing two persons as such commissioners ; but the appointment failed to designate the class of either of the persons so appointed, it was thought by the court that the person first named in the appointment should be considered as appointed for the first class, or for one year, and the other for the third class, to serve three years. (*People v. Supervisors of Richmond Co.* 20 *N. Y. R.* 252.) Should there be a failure to elect commissioners at the annual town meeting, in consequence of a *tie* in the vote, and the meeting adjourn without making an election, it is competent for three justices of the town to appoint a suitable person to the office, who, and not a person subsequently elected at a special town meeting, is entitled to hold the office. (*People v. Van Horne*, 18 *Wend.* 515.)

To give bond.—Every commissioner of highways hereafter to be elected or appointed, shall, before entering upon his duties, and within ten days after notice of his election or appointment, execute to the supervisor of his town, a bond, with two sureties, to be approved by the supervisor by an endorsement thereon, and filed with him, in the penal sum of one thousand dollars, conditioned that he will faithfully discharge his duties as such commissioner, and within ten days after the expiration of his term of office, pay over to his successor, what money may be remaining in his hands as such commissioner, and render to such successor a true account of all moneys received and paid out by him as such commissioner. (*Laws* 1845, *ch.* 180.) (For form of bond and endorsement, see Appendix Nos. 3-5.)

In case of default on the part of the commissioner in the performance of his duties, the bond must be prosecuted in the name of the supervisor of the town. No authority is

given to a commissioner to sue his predecessor on the bond. (See *Fuller v. Fullerton*, 14 Barb. 59; *Jansen v. Ostrander*, 1 Cow. 670; *Armine v. Spencer*, 4 Wend. 406.)

When to meet.—It is the duty of the commissioners of highways of each town to meet within eighteen days after they are chosen, at the place of town meeting, on such day as they shall agree upon, and afterwards at such other times and places as they shall think proper. (1 R. S. 505, § 20.) Where there is but one commissioner he should attend at the same place. The object of this meeting is to make the assessment for highway labor. They can adjourn to another place, or appoint a subsequent meeting. This section is directory, and if they should omit a meeting within the eighteen days, according to the usual construction of such statutes, they could afterwards meet and their proceedings would not be void. As to their powers and duties in making assessments for highway labor, see post, ch. VI.

Resignation.—Should any commissioner of highways desire to resign his office, he may give notice of his intention so to do to any three justices of the peace of the town, who may, for sufficient cause shown to them, accept the resignation. (1 R. S. 348.) It will be the duty of the justices thereupon to appoint some proper person to fill the vacancy. (See form No. 7.)

2. GENERAL POWERS AND DUTIES.

The commissioners of highways in the several towns in this State shall have the care and superintendence of the highways and bridges therein; and it shall be their duty:

1. To give directions for the repairing of the roads and bridges within their respective towns.

2. To regulate the roads already laid out, and to alter such of them as they, or a majority of them, shall deem inconvenient.

3. To cause such of the roads used as highways, as shall have been laid out but not sufficiently described, and such as shall have been used for twenty years, but not recorded, to be ascertained, described, and entered of record in the town clerk's office.

4. To cause the highways, and the bridges which are or may be erected over streams intersecting highways, to be kept in repair.

5. To divide their respective towns into so many road districts as they shall judge convenient, by writing under their hands, to be lodged with the town clerk, and by him to be entered in the town book; such division to be made annually, if they shall think it necessary, and in all cases to be made at least ten days before the annual town meeting.

6. To assign to each of the said road district such of the inhabitants liable to work on highways as they shall think proper, having regard to proximity of residence as much as may be: *provided, however*, that whenever the commissioners of any town shall have neglected for the period of one year, at any time after any public road or highway shall have been laid out, and title thereto acquired by due process of law, to open or work the same, or any part thereof, and whenever any number of inhabitants of any town, in or through which the said road has been laid out, shall have given ten days' notice to the commissioners of said town that they desire to apply the whole or any part of their highway labor to the working of said road, the said commissioners shall forthwith assign the said inhabitants to such road, direct the highway labor, for which they are annually assessed, to be applied to the same, and cause the same to be worked and put in good

order for vehicles and travellers within one year, under the direction of any of the said inhabitants whom such commissioners may appoint as an overseer of the labor so to be applied to such road; and when the number of days' labor assessed in the current year to such inhabitants, as their annual highway tax, is not sufficient to put such road in good order, as aforesaid, then the said inhabitants may anticipate the whole or any part of the highway labor assessed, and to be assessed against them, for a period not exceeding three years; but from no one of the districts into which the said town is divided shall more than one-half of its annual labor be taken and applied to any road not embraced in said district. (*As amended 1853, ch. 63.*)

7. To require the overseers of highways from time to time, and as often as they shall deem necessary, to warn all persons assessed to work on highways to come and work thereon, with such implements, carriages, cattle or sleds as the said commissioners or any or one of them shall direct. (1 R. S. 501, § 1.)

Care and superintendence.—The commissioners shall have the care and superintendence of the highways and bridges in their town. They are superior to the overseers of highways, and have the general control and direction of them in their official acts. All the powers of the overseers must, therefore, be taken to be subordinate to, and under the superior control of, the orders of the commissioners, whom they are bound to obey. It is further to be observed that the duty of overseers is confined to the highways, and it is the commissioners alone who are directed to keep in repair bridges as well as highways. The overseers have no concern with bridges erected over streams, except so far as they are directed generally to execute the orders of the commissioners. (*Bartlett v. Crozier*, 17 John. 447, *per Kent*, Chancellor.) It must be remembered that the

term *road* is used in our statutes synonymously with *highways*. (9 *John*. 349.)

To direct repairs.—It is made the duty of commissioners to give to the overseers directions for the repair of roads and bridges, and as to the manner in which such repair shall be done—as, for instance, how to grade, drain, or level the roads, or how a bridge shall be repaired; and it is the duty of overseers to obey such instructions. (*Bartlett v. Crozier*, *supra*.) If an overseer of highways shall refuse or neglect to perform any of the duties enjoined on him by the commissioners, he shall forfeit the sum of ten dollars for each refusal or neglect, to be sued for by the commissioners, and to be by them applied in making and improving the roads and bridges in the town. (1 *R. S.* 504.)

To regulate and alter.—By the second subdivision, commissioners are authorized and it is made their duty to regulate the roads already laid out, and to alter such of them as they, or a majority of them, shall deem inconvenient. They may restore the boundaries and fences of a highway to its original lines; and if it passes by or through an inconvenient place they may change its location; but if in making such alteration it becomes necessary to take more or other land of the adjoining proprietor, compensation therefor must be made, the same as on the original location of roads. The power to alter is given for the purpose of making the road better by changing its site, and should only be exercised when the road is deemed “inconvenient.” (See *People v. Judges of Courtland Co.*, 24 *Wend.* 493.) The commissioners have power to make alterations in a public highway without the aid or intervention of a jury. (*Garretson v. Clark*, *Lalor's Sup.* 162.) Under the above authority to regulate or alter roads, it seems that the com-

missioners may cut down and grade roads, although by so doing the adjoining premises would sustain indirect and consequential damages, provided the commissioners act in good faith and without malice. (*Radcliff ex'rs v. Mayor of Brooklyn*, 4 N. Y. R. 195. See also, 14 Barb. 629.) See further as to the power and duties of commissioners in altering roads hereafter.

3. TO CAUSE ROADS TO BE ASCERTAINED, DESCRIBED AND ENTERED OF RECORD.

The third subdivision of the above section, authorizing highway commissioners to cause such of the roads used as highways, as shall have been laid out, but not sufficiently described; and such as shall have been used for twenty years, but not recorded, to be ascertained, described and entered of record in the town clerk's office, does *not* authorize the commissioners to say what was *originally intended* either by the owner of the soil, or any one else, in relation to the width or location of the road, any further than such intention has been manifested by permitting the way to be used. It is a power in relation to the road *as it actually exists and has existed* for the last twenty years. It does not authorize the commissioners to create or enlarge, but only to perpetuate the evidence of a public right. Both the *extent and fact* of dedication depend on the user; and the public must take *secundum forma doni*, that is, according to the form of the gift or dedication. (*People v. Judges of Courtland Co.* 24 Wend. 492, per BRONSON, J.)

Where the road has been originally laid out, it is of course competent for the commissioners to remove any encroachments thereon, if they proceed in the manner provided by statute, but before it can be determined whether there is an encroachment, the limits and boundaries must be ascertained and determined in some legal

manner. The jury, which is called to determine the disputed question of an encroachment, has no power to determine the question of the width and boundary of a highway, according to the previous dedication or use which has been neither laid out nor ascertained and described by the commissioners of highways. That duty belongs exclusively to the commissioners, and is to be performed by them in an entirely different manner. (*Talmage v. Hunting*, 29 N. Y. R. 447.)

In ascertaining and describing a road which has not been laid out, but has become a highway merely by public use for twenty years, the powers of the highway commissioners is limited to ascertaining the boundaries of the road according to actual use for twenty years. They have no right in the exercise of this power, to alter and change the boundaries, with reference to present public convenience. (*Id.*)

Where the minutes of a road laid out in 1784 had been entered in the records of the town in 1790, but not signed by the commissioners, and the commissioners of highways in 1805 ascertained the same road and caused a certificate thereof, with the description, to be duly entered of record, and the road, after 1784, had been used as a public road for twelve years, the court held, in an action of trespass against a person for passing over it, that the use of the road as a public highway for twelve years, was *prima facie* evidence of its being laid out by proper authorities, and that the acts of the commissioners, in 1805, duly constituted the road a public highway. (*Colden v. Thurbur*, 2 John. 424.)

So, where the owners of adjoining lands laid out a lane twenty feet wide on their boundary line, for their own convenience, and it was used by all persons having occasion to pass that way, for a great number of years, until 1826, when the commissioners of highways laid out and recorded

a highway, referring to and connected with the lane, and giving egress through the lane to a road beyond; and the public use of the lane was continued until 1848, when the commissioners described it and entered it upon record as a highway, it was held to be a public highway, and that an owner of adjoining land was liable for an encroachment in extending his fences to the middle of it. (*Wiggins v. Tallmadge*, 11 Barb. 457.)

It seems that the uninterrupted use of land as a public highway for twenty years, according to the statute, entitles the commissioners to cause it to be ascertained, described and entered of record, without regard to the intention of the owner in permitting such use. (*Devenpeck v. Lambert*, 44 Barb. 599.)

The proper method to ascertain, describe and enter of record a road, is to have a survey thereof made, and to draw and sign a certificate or order that such road is ascertained and described according to the survey, giving the metes and bounds, and to have the said certificate or order and survey filed and recorded in the town clerk's office. (For forms of order or certificate, see Appendix No. 9.)

In ascertaining, describing and recording a road that has been used for twenty years, or that has been laid out but not sufficiently described, the commissioners perform little more than a ministerial duty, and no appeal lies from their proceeding. (*People v. Judges of Courtland Co.* 24 Wend. 491.) The proper remedy for a party aggrieved, would probably be *certiorari*.

4. TO CAUSE THE BRIDGES AND HIGHWAYS TO BE KEPT IN REPAIR.

It is made the duty of the highway commissioners, by the fourth subdivision of the foregoing section, to cause the highways and the bridges which are or may be erected

over streams intersecting highways, to be kept in repair. Primarily, it is the duty of the commissioners to keep the highways and bridges in repair, either directly or by giving the necessary and proper directions to the overseers for such reparation. This is, in general, to be done through orders to the overseers. It is also made the duty of overseers to repair and keep in order the highways within their several districts (1 *R. S.* 503), but they have nothing to do with bridges over streams, except so far as they are directed, generally, to execute the orders of the commissioners. (*Bartlett v. Crozier*, 17 *John.* 452.)

This duty of keeping a bridge or a highway in repair extends, not merely to the floor of the bridge, or the bed of the road, but to proper guards or railing on their sides or borders, where necessary for the safety or protection of the public. (*Hyatt v. Trustees of Rondout*, 44 *Barb.* 391.)

It is unquestionably true that the highway officers of a town are not required to grade the whole space within the limits of the highway, so that a traveller can safely drive his carriage over every part of it. In ordinary cases, if they provide a pathway for carriages of suitable width, and so define it as that there shall be no reasonable danger of its being mistaken, they will not be in fault if a traveller chuses to try an experiment upon the part which is not thus prepared for travelling. (*Ireland v. Oswego &c. Plank Road Co.*, 13 *N. Y. R.* 531, *per Denio. C. J.*, and cases cited.)

But where a road is so constructed or altered as to present, at one point, two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous precipice, while the other is quite safe, it is the duty of those having charge of the road to indicate, in a manner not to be mistaken by day or night, that the unsafe path is to be avoided; and, if it can-

not be otherwise done, to put up such obstructions as will turn the traveller from the wrong track. (*Id.*)

Not bound to repair without funds.—It is well settled that the duty to make repairs does not attach until funds are provided for the purpose by the public, and until they are in funds sufficient to make such repairs, a mandamus will not lie to compel the commissioners, to make them, nor an indictment for omitting the performance of the duty, nor any action founded upon the breach of duty, (*Garlinghouse v. Jacobs*, 29 *N. Y. R.* 303, and cases cited.) Thus, in an action brought against the commissioners of a town for damages sustained by reason of the breaking down of a bridge in such town. It appeared that one of the defendants had been notified of the unsafe condition of the bridge a year or so previous to the accident; and that prior to and at the time of the accident the commissioners had in their hands a sufficient amount of funds applicable to the reparation of bridges, to have repaired or rebuilt the bridge in question. But that there were several other bridges in the same town needing repairs or rebuilding, and the funds in the defendants' hands were insufficient to repair or rebuild all the bridges. Before the accident in question the defendants had procured materials for the construction of other bridges, the construction of which would have required more funds than the defendants had for such purpose. The court held that the commissioners had a discretion as to which of the bridges in the town they would repair, and that the action could not be sustained. (*Garlinghouse v. Jacobs*, *supra.*)

Liability for not repairing.—The question as to whether commissioners of highways are liable to an action at suit of an individual who has sustained damages by reason of

a clear neglect or omission on their part to cause the necessary repairs to be made, where they have the needful funds to make such repairs, is still an open question in this State. It was decided in *Smith v. Wright*, (24 Barb. 170,) that they are, and Judge BRONSON lays down a similar doctrine in *Adsit v. Brady*, (4 Hill. 630.) See also the cases cited by the appellant's counsel in *Garlinghouse v. Jacobs*, *supra*.

But these decisions have been strongly doubted by eminent judges in both the Supreme Court and Court of Appeals. In the case of *Garlinghouse v. Jacobs*, *supra*, Judge WRIGHT, after an able and elaborate review of the various decisions on the question, lays down the proposition, "that town commissioners of highways are, in no event, liable to a private action for a mere neglect or omission to keep the highways of their town in repair;" and this appeared to meet the approval of the other judges. The question did not, however, arise in the case, as it was shown that there were no funds. (See the cases cited by Judge WRIGHT.) The same view was taken by the judges in *Hickok v. Trustees of Plattsburgh*, (16 N. Y. R. 161.)

As a question of pleading, the cases are not decisive whether an averment of the possession of funds should be made in the complaint, leaving it to the defendants to set up the want of them in the answer or not. *Adsit v. Brady*, (4 Hill. 630,) strongly intimates that the general allegation of neglect and breach of duty is sufficient, and that the commissioners are presumed to have the means of performing a duty with which the statute charges them; while *Smith v. Wright*, (27 Barb. 621,) holds that the complaint should contain a distinct averment of the possession of the requisite funds to make the repairs, and the want of it makes the complaint demurrable.

If an individual can in any case sustain an action against commissioners for damages sustained by a road

negligently and wrongfully left out of repair by them, it can only be when the damages sustained are special and peculiar to the plaintiff; but it cannot be for such damages as are incident to all who travel on the road. (*Cristman v. Paul*, 16 How. 17.)

But a private action would probably lie for an affirmative act by which some injury is done, as for negligently and unskilfully constructing a bridge, or for the negligent execution of a duty resulting in the creation of a public nuisance. (See 16 N. Y. R. 161.)

The commissioners, however, may be indicted for neglecting to make the proper reparation. (Per WRIGHT, J., in *Garlinghouse v. Jacobs*, *supra*, and per BEARDSLEY, J., in *Wilson v. Mayor of New York*, 1 Denio, 599; see also 11 Wend. 539.) But an indictment against them will not lie unless they have funds; and an indictment against them is defective unless it avers that the defendants have funds or other means to defray the expenses of the repairs. (*People v. Adsit*, 2 Hill, 619; 4 Hill, 630.)

Liability of towns.—A town is not liable to a civil action in any event, for an injury occasioned by their suffering a public highway or road to become out of repair, and in a ruinous and unsafe condition. There is no statute or common law liability on towns to repair. They are unlike the parishes in England in this respect. Even the vote of the electors in town meeting, to pay damages arising from the ruinous condition of the roads, being without consideration, cannot bind the town to pay such damages. (*Morey v. Town of Newfane*, 8 Barb. 645; see also *Town of Galen v. Clyde, &c. Plank-road Co.* 27 Barb. 551; *Lorillard v. Town of Monroe*, 11 N. Y. R. 392.)

So, at common law, it was held, that if a traveller receive any special damage by the badness of the roads, and a corporation or private person is bound to repair it,

he may have an action on the case for the damage he receives; but if it belongs to a township, &c., not corporate, he can have no action for special damage, but they are liable to be indicted. (*Vau.* 340; *Cro. Eliz.* 664.)

But the rule is different with regard to incorporated cities and villages; and where trustees of an incorporated village are, by its charter, made commissioners of highways therein, if a road within the corporate limits is out of repair, and the trustees neglect to repair it, an absolute obligation and liability rests on them in regard thereto; and for an injury sustained by an individual in consequence of their negligence, the corporation is liable. (*Hyatt v. Trustees of Rondout*, 44 *Barb.* 385; *Wendell v. Mayor of Troy*, 39 *Barb.* 329, and cases cited.) They are bound to keep the streets and highways in a proper state of repair, and free from all obstructions or defects in the road-bed which vigilance and care can detect and remove. Thus, where they constructed a bridge in so negligent and unskillful a manner, that by means thereof, the plaintiff's building was carried away during a freshet, the corporation was held liable. (*Conrad v. Trustees of Ithaca*, 16 *N. Y. R.* 158.) So, where the trustees of a village neglected to fill up the ditch which a wrong-doer had excavated in the street, it was held to be a corporate duty to keep the street in a safe condition. (*Hickok v. Trustees of Plattsburgh*, 16 *N. Y. R.* 161.) So, where such trustees undertook to construct a platform to connect a sidewalk with a bridge, and, while the work was in progress, carelessly left an uncovered space therein during the night, without placing any guard or signal to warn passengers of such opening, the corporation was held liable to one who had fallen through such opening and sustained injuries thereby. (*Weet v. Trustees of Brockport*, 16 *N. Y. R.* 161.) So, where a corporation caused a culvert to be constructed to carry off the waters of a natural stream, and a freshet

having occurred, the culvert, in consequence of its want of capacity and the unskillfulness of its construction, failed to discharge the waters, so that they were set back upon the factory of the plaintiffs, and injured their property situated therein; it was held, that the corporation was liable for damages. (*Rochester White Lead Co. v. Rochester*, 3 *N. Y. R.* 463.) So, where a corporation had authorized a private individual to construct a drain across the street of a city for his own private benefit, the corporation was held liable for damages sustained from the negligent and improper manner in which the work was done. (*Wendell v. Mayor of Troy*, 39 *Barb.* 329.)

The trustees or corporation may, under certain circumstances, be temporarily exempt from liability where repairs or other work and labor in the street are performed by contractors for the work, and the injury complained of occurs in the progress of the work, by carelessness or negligence on the part of the servants of these contractors. Thus, where a corporation had contracted with an individual to furnish materials and do the work in regulating and levelling a certain street, and the injury complained of had been occasioned by the negligent blasting of rocks, in the execution of the work under that contract, the city corporation was held not liable. (*Pack v. Mayor of New York*, 8 *N. Y. R.* 222; *Kelly v. Mayor of New York*, 11 *N. Y. R.* 432.)

But where the injury is the result of the work itself, however skillfully performed, the corporation, and not the contractor, is liable. Thus, where a sewer was dug in a street by a contractor, which was left open and unguarded at night, with no light or other signal to warn passers of the danger, and there was no stipulation in the contract between the corporation and the contractor, that the contractor should cause proper lights to be placed at the excavation, to prevent accidents, the corporation was held

liable. (*Storrs v. City of Utica*, 17 N. Y. R. 104.) It was thought, in this case, that the city would have been liable even if the contractor had stipulated to keep the proper lights. But in *Blake v. Ferris*, (5 N. Y. R. 48), where the defendants—private individuals—had license from the city to construct a sewer across a street for their own benefit, and let the work to third parties, binding them as they themselves were bound to the city, to cause proper lights to be placed at the excavation to prevent accident, it was held that the contractor, whose servants were guilty of the neglect, was liable, and that the defendants were not. See, however, *the City of Buffalo v. Holloway*, (7 N. Y. R. 493.)

The doctrine of *respondeat superior* is elaborately examined in *Blake v. Ferris*, *supra*, by MULLEN J., and many English and American cases cited and examined.

Repair of bridges.—All public bridges are *prima facie* repairable by the commissioners of highways, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges. But where a bridge has been erected solely for private use, although it may be used by the public, the one who erected it must keep it in repair; as where a man digs a ditch or canal across a highway and makes a bridge over it. In such case, although the public would have to use the bridge in travelling the highway, yet they would derive no benefit from it, since the way was as good before the bridge was built as after it, and are not bound to maintain it. (*Dygert v. Schenck*, 23 Wend. 446.) But if the bridge be built over a natural stream, and the public cross and recross thereon, the town should keep it in repair, although it was built for the private benefit of the builder. (*Id.*) A company lawfully cutting a canal across a highway, for its own purposes, is bound to build and

keep in repair a bridge across it, and so maintain the highway. (*Heacock v. Sherman*, 14 Wend. 58.) (See further on this subject *ante*, page 9.)

5. TO DIVIDE TOWN INTO ROAD DISTRICTS AND ASSIGN INHABITANTS THERETO.

It is further the duty of highway commissioners to divide their respective towns into so many road districts as they shall judge convenient, by writing under their hands, to be lodged with the town clerk, and by him to be entered in the town book; such division to be made annually, if they shall think it necessary, and in all cases to be made at least ten days before the annual town meeting. In making this division the commissioners should all meet and confer; but the order of division will be valid if signed by two of them. It should, however, show that the third met and deliberated with the other two on the subject, or was duly notified to attend for that purpose. (1 R. S. 525, §125. See *Beekman's Petition*, 19 Abb. 244; *Tucker v. Rankin*, 15 Barb. 480.) (See form No. 10.)

Where a road district was formed from parts of two other districts, and was afterwards ordered to be discontinued by the commissioners of highways, it was held that the order was valid, though it did not expressly provide for embracing the territory to which it related within any other road district; the effect being to restore the two districts to their original limits. (*People v. Sly*, 4 Hill, 593.) Where commissioners of highways of two towns lay out a road upon the line of the towns, they must divide it into two or more road districts, and allot an equal number of the districts to each town, and each district thenceforth wholly belongs to the town to which it is allotted for the purpose of opening and improving the road and keeping it in repair. (1 R. S. 516, §§ 73, 74, 75; *Bradley v. Blair*, 17 Barb. 480.) So, all highways heretofore laid out upon

the line between any two towns shall be divided, allotted, recorded and kept in repair in the manner above described. (1 R. S. 516, § 76.)

To assign inhabitants.—The sixth subdivision provides for the assignment to each of the road districts of such of the inhabitants liable to work on the highways as they may deem proper, having reference to proximity of residence as much as may be. It also provides that where the commissioners shall have neglected, for one year after a road has been laid out and title thereto acquired, to open and work the same, that any number of the inhabitants of the town in or through which such road passes, may give ten days' notice to the commissioners of the town that they desire to apply their labor to the working of said road, and that the commissioners shall thereupon assign the said inhabitants to such road, and direct their labor to be performed thereon under the direction of one of their number; and that, if the labor assessed against such inhabitants for the current year shall not be sufficient to put the road in proper repair, they may anticipate their labor for three years, but that from no one of the districts of the town shall more than one-half of its annual labor be so taken and applied.

Whenever any plank road or turnpike road shall be built in pursuance of the statute, upon the site of an old highway, it shall be the duty of the commissioners of the highways of the town where such road shall be made, to designate some district or districts, within their town, on which the highway labor of the inhabitants residing along the line of said plank or turnpike road shall be performed. *Laws 1849, ch. 250, § 11.* (See form No. 10.)

Warning.—It is made the duty of the commissioners by subdivision seven of the above section, to require the over-

seers from time to time, and as often as they shall deem necessary, to warn all persons assessed to work on highways, to come and work thereon, with such implements, carriages, cattle or sleds, as the said commissioners or any one of them shall direct.

It is the duty of overseers to warn all such persons, when so required by the commissioners, or any one of them, and for every refusal or neglect so to do, such overseers shall forfeit the sum of ten dollars, to be sued for and collected by the commissioners. (1 *R. S.* 504, § 16.)

6. TO LAY OUT AND DISCONTINUE ROADS.

"The commissioners of highways shall have power, in the manner and under the restrictions hereinafter provided, to lay out on actual survey, such new roads in their respective towns as they may deem necessary and proper; and to discontinue such old roads and highways, as shall appear to them, on the oaths of twelve freeholders of the same town, to have become unnecessary." (1 *R. S.* 502, § 2; see forms Nos. 44-54.)

The restrictions above alluded to are, that no road shall be laid out through any orchard or garden, without the consent of the owner thereof, if such orchard be of the growth of four years or more, or if such garden has been cultivated for four years or more before the laying out of such road. Nor shall any such road be laid out through any buildings or fixtures or erections for the purposes of trade or manufactures, or any yards or inclosures necessary to the use and enjoyment thereof, without the consent of the owner. (1 *R. S.* 514, § 57.) And, further, that no highway shall be laid out through inclosed, improved or cultivated land, without the consent of the owner or occupant thereof, unless certified to be necessary by the oath of twelve reputable freeholders of the town,

in the manner hereinafter provided. (*Id.* § 58.) Nor through the lands of an incorporated soldier's monument association, without the consent of the trustees thereof, except by special permission of the Legislature. (Laws 1866, ch. 273, § 6.)

Consent.—A parol consent to lay out a road through any premises above described, is valid, provided it be acted upon, and the road laid out before any revocation, but such consent is revocable, and is revoked by a sale and conveyance of the land in good faith, prior to the laying out of the road. (*People v. Goodwin*, 5 *N. Y. R.* 568; *People v. Albright*, 23 *How.* 306.) Although such consent may be revoked, it must be done before the road is laid out. If the commissioners act immediately on the faith of the virtual consent by laying out the road, the owner will be estopped from denying the legality of the act. (*Marble v. Whitney*, 28 *N. Y. R.* 297.) Prudence would dictate that the consent of the owner should be obtained in writing.

Who may apply.—Every person liable to be assessed for highway labor, and owning lands in a town in which he is not a resident, may apply to the commissioners of such town to alter, discontinue or to lay out any road through the same. (Laws of 1836, ch. 122.)

The word "same," in the above act, refers to the town, and not to the land of a non-resident. (*People v. Eggleston*, 13 *How.* 123.)

Without application.—It is not essential to the validity of the proceedings of commissioners in laying out a road, that there should be an application therefor in writing; nor in fact any application, since it is decided that they may lay out a highway upon their own motion, and without any application therefor. (*People v. Supervisors of*

Richmond, 20 *N. Y. R.* 252; *Marble v. Whitney*, 28 *N. Y. R.* 305.) Nor is it any objection that the proceedings are taken on the application of one not liable to assessment for highway labor. (*Id.*)

Through buildings, fixtures, etc.—They have no power to lay out a road through a court-yard contiguous to a dwelling, nor ground adjoining a factory, and actually used and occupied by its machinery and appurtenances. (*Clark v. Phelps*, 4 *Cow.* 190; *Lansing v. Caswell*, 4 *Paige*, 519; *Ex parte, Clapper*, 3 *Hill*, 458.) But grounds adjacent to an establishment, used for trade or manufactures, and occupied for its purposes, but not defined by any visible marks, or by definite occupation within some certain lines, are not within the provisions of the 57th section above cited. (*People v. Kingman*, 24 *N. Y. R.* 559.) Nor is a ditch or canal by which water is conducted to a mill, a building, fixture or erection, within the meaning of said section. (*Id.*) So, the provision of the statute, that no road should be laid out through an orchard, is not violated by laying out a road through an inclosed field in which there are fruit trees, if not so laid out as to deprive the owner in whole or in part of the beneficial enjoyment of the trees. (*People v. Judges of Dutchess*, 23 *Wend.* 360.) If a road be laid through an orchard of four years' growth, without the consent of the owner, entering to open and work it, is a trespass. (*Harrington v. People*, 6 *Barb.* 607.)

The owner cannot defeat the laying out of a road, by erecting or moving a building upon the proposed line, after an application has been made; in such case the commissioners may proceed and lay the road through it. (*Carris v. Commissioners of Waterloo*, 2 *Hill*, 443.)

When two may act.—Commissioners of highways, in laying out a road, must all be present and deliberate on

the subject, or else must have been duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon, but a majority of them may decide. It must appear, however, in the order filed by them that all the commissioners met and deliberated on the subject, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon. (1 R. S. 525, § 125; *Babcock v. Lamb*, 1 Cow. 238.)

An order laying out a highway through improved, inclosed or cultivated land, signed by only two of the commissioners, and not reciting that the third participated in the proceedings, or was notified to do so, is void. (*People v. Hynds*, 30 N. Y. R. 470; *Stewart v. Wallis*, 30 Barb. 344.) The order must be sufficient on its face. Its defects cannot be helped out or supplied by parol. (*Id.* *Fitch v. Commissioners of Kirkland*, 22 Wend. 132.) Where the third commissioner did not participate in the proceeding, the order must show that he was duly notified to attend *for the purpose of deliberating on the subject of laying out the road*. A simple allegation that one of them *had been duly notified to attend* is insufficient. (*Fitch v. Commissioners of Kirkland*, *supra*.)

Where an order was made by two commissioners of highways laying out a road, in which it was recited that all the commissioners met and deliberated on the subject, and the referee found, as facts, that all three of the commissioners met and viewed the proposed route, and that subsequently two of them caused it to be surveyed and made the order, as of that date, laying out the road; and that one of the commissioners was not present at the survey, nor notified to attend the same, it was held that the order was valid, in the absence of any finding that the third commissioner did not meet with the others and deliberate on the subject of laying out the highway; the presumption being that all the commissioners did meet

and deliberate on that subject, and that the act was legal until the contrary appeared. The survey was a mere ministerial act, not requiring the presence of the third commissioner to give validity to the order laying out and establishing the highway. (*Marble v. Whitney*, 28 N. Y. R. 297.)

Acts may be impeached.—In laying out a highway the commissioners exercise a special and limited jurisdiction, and although it may be presumed that their acts were legal until the contrary appear, their acts may be impeached. If they have no jurisdiction, as where they lay out a road through a yard or building, without the consent of the owner, their order is void, and is not helped by the affirmance of the judges on appeal. (*Ex parte Clapper*, 3 Hill, 458; *People v. Eggleston*, 13 How. 123.) But a void order is no bar to a new proceeding. (*People v. Eggleston*, *supra*.) The application to lay out a new road, and to discontinue an old one, may be in one, and whether the proceedings to discontinue the old road are valid or not, will not affect the new road, if that is properly laid out. (*People v. Robertson*, 17 How. 74.)

Discontinuing road.—To authorize the commissioners to discontinue an old road, it must appear to them on the oaths of twelve freeholders of the same town, to have become unnecessary. The statute, by "freeholders," means such as have the *legal* title to real estate—such as are freeholders without a proceeding in court to make or declare them so. (See *People v. Hynds*, 30 N. Y. R. 472.) If the jury proceed without the oath of *twelve* freeholders, their proceedings will be void. (*Id.*)

To summon jury.—When application is made for the discontinuance of an old road, on the ground that it is useless and unnecessary, the commissioners must summon

twelve disinterested freeholders of the town, to meet on a day certain to consider such application. Such freeholders are to be sworn by one of the commissioners, well and truly to examine and certify in regard to the propriety of such discontinuance. (1 R. S. 517, § 81.) The commissioners need not issue any process to summon a jury; it will be sufficient to request the jury to serve upon the application. (*People v. Commissioners of Greenbush*, 24 Wend. 369.) But if process be used to summon the jury, and it afterwards prove that such process was void, the jury will not be disqualified from acting, provided they be legally requested to serve. (*Id.*) The statute does not authorize the commissioners to call in the aid of an officer to summon the jury. That is the duty of the commissioners themselves. (*Id.*)

How to proceed.—The jury are to proceed to view such road, and if they come to the conclusion that the road is useless and unnecessary, they are to make and subscribe a certificate to that effect, and to deliver the same to the commissioners. The commissioners thereupon proceed to decide upon such application. (1 R. S. 518, § 82.)

What roads.—The power of commissioners to discontinue roads is limited to roads which have, since they were laid out, become, or proved upon trial to be useless and unnecessary. It does not enable them, or a jury of freeholders called by them, to reverse decisions laying out roads, especially where such decisions have been affirmed on appeal. (*People v. Pike*, 18 How. 70.) See further as to the powers and duties of commissioners in laying out or discontinuing roads hereafter. (For forms herein, see Appendix No. 42.)

7. TO ACCOUNT TO TOWN AUDITORS.

The commissioners of highways of each town, shall render to the board of town auditors at their annual meeting

for auditing the accounts of town officers, an account in writing, stating,

1. The labor assessed and performed in such town.
2. The sums received by such commissioners for fines and commutations, and all other moneys received under this chapter.
3. The improvements which have been made on the roads and bridges in their town, during the year immediately preceding such report, and an account of the state of such roads and bridges, and,
4. A statement of the improvements necessary to be made on such roads and bridges, and an estimate of the probable expense of making such improvements, beyond what the labor to be assessed in that year will accomplish. (1 *R. S.* 502, § 3.) See form No. 11.

By the act of 1863 it is provided that, "The town auditors in the several towns of this State, shall examine the accounts of the overseers of the poor and the commissioners of highways of such town, for all moneys received and disbursed by them, and shall meet for the purpose of examining the same, annually, in each town of this State, on the Tuesday preceding the annual town meeting to be held in each town.

"The commissioners of highways in each town of this State, and all town officers who receive or disburse any moneys belonging to their respective towns shall, on the last Tuesday preceding the annual town meeting of their town, account with the board of town auditors of such town for all moneys received and disbursed by them by virtue of their offices.

"The said board of town auditors shall make a statement of such accounts, and append thereto a certificate, to be signed by a majority of the board, showing the state of the accounts of the said highway commissioners and other officers at the date of the certificate; which statement and

certificate shall be filed with the town clerk of the town, and be by him produced at the next annual town meeting, and publicly read." (*Laws* 1863, *ch.* 172.)

8. IN RAISING MONEY FOR REPAIRS OF ROADS AND BRIDGES.

The commissioners of highways of each town shall deliver to the supervisor of such town a statement of the improvements necessary to be made on the roads and bridges, together with the probable expense thereof; which supervisor shall lay the same before the board of supervisors at their next meeting. (See form No. 12.)

The board of supervisors shall cause the amount so estimated to be assessed, levied and collected in such town, in the same manner as other town charges; but the money to be raised in any such town shall not exceed in any one year the sum of two hundred and fifty dollars. (1 *R. S.* 502, § 4.)

Additional appropriation.—By the act of 1832 (*chapter* 274), "for the more effectual improvement of roads and bridges," it was provided that when the commissioners should not deem the sum of two hundred and fifty dollars sufficient to pay the expenses actually necessary for the improvement of roads and bridges, a further sum, not exceeding two hundred and fifty dollars, might be raised. The act is in the following words:

"§ 1. Whenever the commissioners of highways of any town in this State shall be of opinion that the sum of two hundred and fifty dollars, as now allowed by law, will be insufficient to pay the expenses actually necessary for the improvement of roads and bridges, it shall be lawful for such commissioners to apply in open town meeting, for a vote authorizing such additional sum to be raised as they may deem necessary for the purpose aforesaid, not exceeding two hundred and fifty dollars, in addition to the sum now allowed by law."

Notice of application.—"§ 2. Before making such application, it shall be the duty of the commissioners to give notice of their intended application, by posting the same in a conspicuous manner, in at least five of the most public places in such town, at least four weeks next preceding the annual town meeting; such notice shall specify the amount to be applied for, and the purposes to which the same is to be appropriated, with the probable amount necessary to be expended at each place, if there shall be more than one." (See form No. 13.)

To exhibit accounts and estimates.—"§ 3. Whenever any application for a grant of money for the purposes mentioned in the first section of this act, shall be made to any town meeting, it shall be the duty of the commissioners making the same, to exhibit a statement of their accounts, and an estimate of the expenses necessary for the improvement of roads and bridges in such town the ensuing year."

How money to be raised.—"§ 4. If the town meeting shall, by their votes, determine that a sum over and above the amount now allowed by law, will be necessary for the improvement of roads and bridges, or to pay any balance that may be due, the clerk shall enter such resolution as shall be agreed to in the minutes of the meeting, and deliver a copy thereof to the supervisor of the town, who shall lay the same before the board of supervisors, at their next annual meeting; and it shall be their duty to cause the amount specified in such resolution to be levied and collected, in the same manner as other town charges of such town."

Further appropriation.—By the fifth subdivision of section first of the act of 1838 (*chapter 314*), "to enlarge the powers of boards of supervisors," the board of supervisors of each county is empowered:

"To cause to be levied, collected and paid in the manner now provided by law, such sum of money, in addition to the sum now allowed by law, not exceeding five hundred dollars in any one year, as a majority of the qualified voters of any town may, at any legal town meeting, have voted to be raised upon their town, for constructing or repairing roads and bridges in such town."

By the second section of the same act it is provided that, "No moneys shall be raised under the authority conferred by the fifth subdivision of the preceding section (which is the subdivision cited above), unless a written notice of the application to such town meeting to raise such amount shall be posted on the door of the house where the town meeting is to be held, and also at three public places in such town for two weeks before the town meeting, and be also openly read to the electors present immediately after the opening of the meeting." (See form No. 13.)

A further act was passed in 1857 (*chapter 615*), which provided that,

"Whenever the commissioners of highways of any town in this State shall be of opinion that the sum now provided by law will be insufficient to pay the expenses actually necessary for the improvement of roads and bridges, and to pay any balance that may be due for such improvement, it shall be lawful for such commissioners to apply in open town meeting for a vote authorizing such additional sum to be raised as they may deem necessary for the purposes aforesaid, not exceeding seven hundred and fifty dollars in addition to the sum now allowed by law. The same notice shall be given by the commissioners of their intention to apply for the raising of such additional sum as is now required by law for the raising of money for roads and bridges above the amount of two hundred and fifty dollars." (See form No. 13.)

COMMISSIONERS, THEIR POWERS AND DUTIES. 91

Borrowing money.—Again, the board of supervisors in each county are empowered by the ninth subdivision of section four of the act of 1849 (*chapter 194*).

"To authorize any town in such county, by a vote of such town to borrow any sum of money, not exceeding four thousand dollars in one year, to build or repair any roads or bridges in such town, and prescribe the time for payment of the same, which time shall be within ten years, and for assessing the principal and interest upon such town."

Where road or bridge is damaged or destroyed.—By the act of 1858 (*chapter 103, as amended in 1865, chapter 442*), entitled "An act to provide for the speedy construction and repair of roads and bridges where the same shall have been damaged or destroyed," it is provided that:

"§ 1. In case any road or roads, bridge or bridges shall be damaged or destroyed by the elements or otherwise, after any town meeting shall have been held, and since the fifteenth day of February, A. D., eighteen hundred and sixty-five, then, and in that case, it shall be lawful for the commissioner or commissioners of highways, by and with the consent of the board of town auditors or a majority thereof of the town or towns in which such road or roads, bridge or bridges shall be situated, to cause the same to be immediately repaired or rebuilt, although the expenditure of money required may exceed the sum now authorized to be raised by law upon the taxable property of the town or towns for such purposes; and the commissioners of highways shall present the proper vouchers for the expense thereof to the town auditors, at their next annual meeting, and the said bill shall be audited by them, and the amount audited thereon shall be collected in the same manner as amounts voted at town meetings as now required.

The commissioners acting under this act, shall be entitled to receive for each day's service actually rendered, two dollars."

"§ 2. The board of town auditors may be convened in special session by the supervisor, or, in his absence, the town clerk, upon the written request of any commissioner of highways, and the bills and expenses incurred in the erection or repairs of any such roads or bridges, may then be presented to and audited by such board of town auditors; and the supervisor and town clerk shall issue a certificate, to be subscribed by them, setting forth the amount so audited and allowed, and in whose favor, and the nature of the work done and material furnished; and such certificate shall bear interest from its date, and the amount thereof, with interest, shall be levied and collected in the same manner as other town expenses."

"§ 3. No account for services rendered or material furnished according to the provisions of this act, shall be allowed by such board, unless the same shall be accompanied by the affidavit of the party or parties performing such labor or furnishing such material, nor unless the commissioner or commissioners shall certify that such service has been actually performed, and such material was actually furnished, and that the same was so performed or furnished by the request of said commissioner or commissioners, and such board of auditors may require and take such other proof as they may deem proper to establish any claim for such labor and material, and the value therefor."

9. TO APPOINT OVERSEERS, AND TO PROSECUTE THEM FOR NEGLECT OF DUTY.

Prior to 1865, the overseers of highways were elected by the electors of each town at their annual town meeting (1 *R. S.* 340, § 3), but by the act of that year (*Laws*

of 1865, *chapter 522, § 7*), it is provided that, "From and after the passage of this act, the commissioner or commissioners of highways in each town in this State, shall have the power, and it shall be their duty, within one week after such annual town meeting, by an instrument in writing, under their hands, to be filed with the town clerk, to appoint as many overseers of highways in their respective towns, as there are road districts therein, to hold their office during one year; and it shall be the duty of the town clerk to notify each overseer of his appointment, as now required by law in case of elections; and all provisions of law now applicable to overseers of highways heretofore elected under the provisions of the sections above amended, shall apply to overseers of highways appointed under the provisions of this act." (For form of order appointing, see Form No. 14.)

To fill vacancies.—If any person chosen to the office of overseer of highways shall refuse to serve, or if his office shall become vacant, the commissioners of highways of the town shall, by warrant under their hands, appoint some other person in his stead; and the overseer so appointed shall have the same powers, be subject to the same orders, and liable to the same penalties as overseers chosen in town meetings. (1 R. S. 504, § 14.) The commissioners making the appointment, shall cause such warrant to be forthwith filed in the office of the town clerk, who shall give notice to the person appointed, as in other cases. (*Id.* § 16; see post. Overseers, their Powers and Duties; see form No. 15.)

A person who has been appointed overseer, and has neglected or refused to serve, cannot be again appointed under the foregoing provision, since that provides that the commissioners shall appoint "some other person." (*Haywood v. Wheeler*, 11 John. 432.)

To prosecute overseers.—It is also the duty of the commissioners, whenever any resident of the town shall make complaint that any overseer of highways has refused or neglected to perform the duties imposed on him, and shall give or offer to such commissioners sufficient security to indemnify them against the costs, forthwith to prosecute such overseer for the penalty annexed to such refusal or neglect. (1 R. S. 505, § 17.) In case the commissioners shall neglect or refuse to prosecute for such penalty, they forfeit the sum of ten dollars, to be recovered by the person making the complaint. (*Id.* § 18.) (For form of complaint and security, see Appendix Nos. 16 and 17.)

10. MISCELLANEOUS POWERS AND DUTIES.

Milestones.—"It shall be the duty of the commissioners of highways of each town to cause mile-boards or stones to be erected, where not already erected, on the post-roads, and such other public roads in their town as they may think proper, at the distance of one mile from each other, with such fair and legible inscriptions as they may think proper." (1 R. S. 503, § 5.)

Guide-posts.—"The commissioners of highways of each town shall cause guide-posts, with proper inscriptions and devices, to be erected at the intersection of all post-roads in their town, and at the intersection of such other roads therein as they may deem necessary." (1 R. S. 504, § 9.)

It is made the duty of the overseer to maintain and keep in repair, at the expense of the town, the guide-posts so erected. (*Id.* § 10.)

Scraper, &c.—"The commissioners of highways, whenever they shall think it necessary or useful, may direct and empower any overseer of highways in their respective towns to procure a good and sufficient iron or steel shod

scraper and plough, or either of them, for the use of his road district; to be paid for by the moneys arising from commutations and fines within such district." (*Id.* § 11.)

"In case such moneys shall be insufficient for the purpose, the deficiency shall be assessed by the overseers upon the inhabitants of the district in the proportion they are respectively assessed on the assessment roll of said town; and if any one so assessed shall neglect or refuse to pay such assessment the same may be sued for and recovered by the overseer." (*Id.* § 12.)

Fence viewers.—The commissioners of highways elected in every town, together with the assessors are, by virtue of their office, fence viewers of their town. (1 *R. S.* 340.)

Fire in forest.—Where the woods in any town are on fire, it is the duty of the commissioners to act with the supervisor and the justices of the peace in taking means to arrest its progress. They are, severally, to order such and so many of the inhabitants of such town liable to work on the highways, and residing in the vicinity of the place where such fire shall be, as they shall deem necessary, to repair to the place where such fire shall prevail, and there to assist in extinguishing the same, or in stopping its progress. If any person so ordered shall neglect or refuse to comply therewith he shall forfeit and pay the sum of fifty dollars, and shall also be liable to fine or imprisonment, or both, at the discretion of the court. (1 *R. S.* 697.)

Majority may act.—Any two commissioners of highways of any town may make any order in the execution of their powers and duties conferred by the statute, provided it shall appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were duly noti-

fied to attend a meeting of the commissioners for the purpose of deliberating thereon. (1 R. S. 525, § 125.) Where only two have met, care should be taken to make it clearly appear in the order that all the commissioners were duly notified to attend the meeting *for the purpose of deliberating on the subject embraced in the order*. A simple allegation in the order that all have been duly notified to attend is insufficient. (*Fitch v. Commissioners of Kirkland*, 22 Wend. 132.)

11. ACTIONS BY OR AGAINST.

The commissioner or commissioners of highways in each of the towns of this State are hereby empowered to bring any action against any railroad corporation that may be necessary or proper to sustain the rights of the public in and to any highway in such town, and to enforce the performance of any duty enjoined upon any railroad corporation in relation to any highway in the town of which they are commissioners, and to maintain an action for damages or expenses which any town may sustain, or may have sustained, or may be put to, or may have been put to, in consequence of any act or omission of any such corporation in violation of any law in relation to such highway. (*Laws 1855, ch. 255, § 1.*)

Nothing in the above act, however, is to be construed as in any manner impairing the rights of any person or officer to bring any action now authorized by law. (*Id.* § 2.)

The commissioners of highways are also expressly authorized to sue, upon any contract lawfully made with them or their predecessors, in their official character; to enforce any liability or any duty enjoined by law, to such officers or the body which they represent; to recover any penalties or forfeitures given to such officer or the bodies whom they represent; and to recover damages for any

injuries done to the property or rights of such officers, or of the bodies represented by them. (2 R. S. 473, § 92.)

Such actions may be brought by such officers in the name of their respective offices, notwithstanding the contract or obligation on which the same is founded may have been made with, or to any predecessors of such officers, in their individual names or otherwise, and notwithstanding any right of action may have accrued previous to the time when the officers commencing such suit entered upon the execution of the duties of their office. (§ 93.)

Commissioners may also sue for penalties incurred by corporations the same as against individuals. They may file a bill in the Supreme Court to enforce such penalties and prosecute the same to judgment. (*Laws* 1837, ch. 431.)

As a general rule all public officers, though not expressly authorized by statute, have a capacity to sue commensurate with their public trust and duties. (*Overseers of Pitts-town v. Overseers of Plattsburgh*, 18 John. 407; *Todd v. Birdsall*, 1 Cow. 260, and note p. 261; and see *Supervisors of Galway v. Stimson*, 4 Hill, 136.) An implied authority is conferred on them to bring all suits, as incident to their office, which the proper and faithful discharge of their official duties requires.

It seems, however, that an action on the case does not lie at the suit of the commissioners of highways against a turnpike company, for entering upon and taking possession of a public highway, and appropriating it to the use of the company previous to the appraisal and payment of damages; the remedy in such case is by indictment, summary abatement of the encroachment, or action for the penalty of treble damages given by statute. (*Cornell v. Butternuts, &c. Turnpike Co.* 25 Wend. 365.) The town, or commissioners of highways have no property in the public roads which can enable them, like an individual for

an injury done to his freehold, or incorporeal rights, to sustain a private action for damages done to him. The fee belongs to the owners of the premises through which the highways are laid, subject to an easement of way for the public use. This right of enjoyment is a public one, confined to neither town or county. It is upon this view that the remedies, in case of interruption, are given to the public by indictment, summary abatement or penalty; private remedies are confined to the owner of the soil, or persons who have sustained a particular injury. (*Id.*)

Title of action.—In actions by or against commissioners of highways the individual names of the incumbents must be used, with the addition of their names of office, and the complaint should, by proper averment, show that the claim is made by the officer and not by the individual. Merely adding to the names of the plaintiffs in the title of the cause the words "commissioners of highways, &c.," will not render the action an action in favor of the plaintiffs in their official character, unless the necessary averments are inserted in the complaint. (2 R. S. 474, § 46; *Gould v. Glase*, 19 Barb. 179; *Supervisor of Galway v. Stimson*, 4 Hill, 136.)

Action against successors.—When any contract shall have been entered into or any liability shall have been incurred, by or in behalf of the town, by the highway commissioners in the scope of their authority, the same remedies may be had against any successors of such commissioners, in their official character, as might have been had against such officers, if they had continued in office. (2 R. S. 474, § 98.) Thus, where they have given notes in their official character for liability incurred by them in behalf of the town, within the scope of their authority, the law gives the same remedy against their successors as

might have been had against those who signed the notes, had they remained in office. (*Potter v. Davis, Lator's Sup.* 394.) Where, however, they have exceeded their authority in entering into the contract, or in incurring the liability, such contracts or liabilities are not obligatory on their successors in office. (See *Palmer v. Vandenburg*, 3 *Wend.* 197; *Silver v. Cummings*, 7 *Wend.* 182.)

The commissioners of highways have no power to contract a debt against the town by borrowing money for the repair of roads and bridges; accordingly, where they borrow money for such purpose, on a note purporting to bind them in their official capacity, it was held that an action could not be maintained against their successors to recover the amount. (*Barker v. Loomis*, 6 *Hill* 463; *Matter of Crawford*, 36 *Barb.* 564.) In such case the commissioners making the contract will be themselves personally liable. (*Palmer v. Vandenburg, supra.*)

Abatement, &c.—No suit commenced by or against any commissioner of highways shall be abated or discontinued by his death, removal from, or resignation of his office; nor by the expiration of his term. The court in which any such action shall be pending, shall substitute the name of the successor in such office upon the application of such successor or of the adverse party. (2 *R. S.* 474, § 100.) But before any new defendant shall be so substituted without his consent, at least fourteen days' notice of the application for that purpose shall be personally served on him. (*Id.* § 101.)

Employing counsel.—The commissioners may employ counsel in the preparation and trial of an indictment against any individual for obstructing a public highway, and to render other legal services in relation to matters connected with the control and management of highways;

such authority is incident to their official character. (*Duntz v. Duntz*, 44 Barb. 459.) And if the commissioner advances money out of his own pocket to pay such attorney for his services, and takes an assignment of his claim, to himself individually, he may maintain an action thereon against his successor in office. (*Id.*)

On securities for penalties.—The commissioners are authorized to prosecute for the recovery of penalties for encroachments on highways (1 R. S. 526, § 130–131), and are, of course, competent to adjust controversies in relation to such encroachments by amicable settlement. If in so doing they deem it advisable, in the exercise of a sound discretion, to take security for the payment of money at a future day, it seems that there is no reasonable objection to such an arrangement. (*Commissioners of Cortlandville v. Peck*, 5 Hill 215.)

On note for funds loaned.—The power of the commissioners to loan the moneys in their hands and to enforce the collection of securities taken therefor, is fairly derivable from their general powers and duties. The commissioners are individually responsible to the town for the proper application of funds placed in their hands for public purposes; and if they choose to take the risk upon themselves, by loaning the funds, the security taken will be valid, and a recovery may be had thereon in default of payment. Accordingly, in an action by the commissioners of highways upon a promissory note payable to them as such, the consideration of which was money loaned by them belonging to the public, it was held that they were entitled to recover. (*Id.*)

On bonds of indemnity.—It is a general rule that public officers, acting under a statute authority, must confine

themselves strictly within the powers conferred by the act. Therefore, where some of the inhabitants in a village, being desirous to have one of the streets therein extended and opened, applied to the commissioners of highways of the town, who alone had power to make the improvements, and the commissioners consented to do it, but took a bond from the applicants, to indemnify the town against the expenses of the improvements. In an action upon this bond, it was held that the action would not lie; that the commissioners were authorized to lay out and open roads, when in their judgment the public convenience requires it; but not, as the learned judge who delivered the opinion expressed it, "to be tampering with parties and making conditions. (*Webb v. Albertson*, 4 Barb. 51.) The same rule has been recognized and applied by the Court of Appeals, in the case of *Palmer v. Fort Plain &c. Plank-road Co.* (11 N. Y. R. 376.)

Judgment, how collected.—In suits by or against commissioners of highways, the debt, damages or costs recovered against them, shall be collected in the same manner as against individuals, and the amount so collected shall be allowed to them in their official accounts. (2 R. S. 476, § 108.)

12. MAY CONSENT TO USE OF HIGHWAY BY RAILROAD COMPANY.

Whenever any association or individual shall construct a railroad upon land purchased for that purpose, on a route which shall cross any road or other public highway, it shall be lawful for the commissioners of highways, having the supervision thereof, to give a written consent that such railroad may be constructed across, or on such road or other public highway; and, thereafter, such association or individual shall be authorized to construct and use

such railroad across, or on such roads or other highways as the commissioners shall have permitted; but any public highway thus intersected or crossed by a railroad, shall be so restored to its former state as not to have impaired its usefulness. (*Laws 1835, ch. 300.*) (See form of consent, form No. 18.)

The consent of the commissioners of highways to the use of a highway by a railroad company, or the authority conferred in the above provision, on railroad companies to construct their railroads across, or on roads and highways after having acquired such consent, relate only to the public property in the road—the public use and enjoyment of it—without intending to interfere with any private or individual interest that might be concerned. (*Fletcher v. Auburn &c. Railroad Co. 25 Wend. 462; Davis v. Mayor of New York, 14 N. Y. R. 521.*) The owner of the fee is entitled to every use and enjoyment of the soil of the highway, not inconsistent with the public easement. A railroad company cannot, even with the consent of the highway commissioners, or by authority from the Legislature, enter upon and appropriate a highway for purposes other than those for which such highway was established, without first making a just compensation therefor to the owners of the fee. (*Id. Williams v. N. Y. Central R. R. Co. 16 N. Y. R. 97.*)

Such an appropriation of a highway by a railroad company is the imposition of an additional burden, and is a taking of the property of the owner of the fee within the meaning of the constitutional provision which forbids such taking without compensation. (*Id.*) The railroad company can, therefore, acquire no title under the license or consent of the commissioners of highways, without also obtaining the consent of the owner of the fee, or appraising and paying the damages in the mode provided by law. (*Id.*) We shall have occasion to consider this sub-

ject further, under the head of *Railroads in Highways and Streets*.

13. MAY AGREE WITH PLANK-ROAD OR TURNPIKE COMPANY FOR USE OF HIGHWAY.

Whenever it shall become necessary for any plank-road or turnpike company to use any part of a public highway for the construction of their road, the supervisor and commissioners of the town in which such highway is situated, or a majority, if there be more than one such commissioner, may agree with such company upon the compensation and damages to be paid by said company for taking and using such highway. Such agreement shall be in writing, and shall be filed and recorded in the town clerk's office of such town. (See form No. 19.)

In case such agreement cannot be made, the compensation and damages for taking such highway shall be ascertained in the same manner as the compensation and damages for taking the property of individuals. Such compensation and damages shall be paid to the said commissioners, to be expended by them in improving the highways of such town. (*Laws* 1847, *chap.* 210, § 26; see also *Laws* 1847, *chap.* 398, § 4.) But the supervisor and commissioners cannot make the agreement as above provided, without the plank-road or turnpike company shall first have obtained the consent in writing of at least two-thirds of all the owners of land along such highway, who shall actually reside on that part of the highway on which such plank-road or turnpike road is to be constructed. (*Laws* 1850, *chap.* 71, § 5.)

After such turnpike or plank-road company has procured by agreement from such supervisor and commissioners of the town, the right to take and use any part of the highway necessary for the construction of their road, such company may proceed to construct its road on such

highway, without making application to the board of supervisors as was required by section 4, of chapter 210, of the Laws of 1847. (*Laws 1847, chap. 398, § 1.*)

The above provision authorizes the supervisor of the town and commissioners of highways, to agree with the turnpike or plank-road company upon the compensation and damages to be paid for taking and using a highway. The consideration must be a *pecuniary* compensation and damages to be paid to the commissioners, for the improvement of roads. It does not authorize those officers to release and grant to the company the public right to a highway, without a pecuniary consideration not to convey such public right upon conditions. Thus, where the right to take and use a highway for the construction of a plank-road, was granted, *in consideration of the public benefit to result therefrom*, and upon conditions that no gate should be erected or tolls demanded on such road, within three miles of a certain point, and the company, after taking possession of the highway under the agreement, proceeded in violation of such agreement, to erect such toll-gates within the prescribed limits, and an action was brought to compel the company to perform it; it was held, that the action would not lie. (*Palmer v. Fort Plain &c. Plank-road Co.* 11 N. Y. R. 376.)

14. MANDAMUS AGAINST.

Where the commissioners of highways neglect or refuse to perform a duty enjoined on them, they may be compelled to do it by mandamus. A mandamus is defined to be a prerogative writ issuing in the name of the King, from the court of King's Bench, and directed to any person, corporation, or inferior court of judicature, requiring them to do some particular thing which appertains to their office and duty. (3 *Black. Com.* 110.) In this State the writ

would issue in the name of the people from the Supreme Court.

The power of the Supreme Court to grant a mandamus, at the suit of the people, to compel commissioners of highways to perform their duty has often been exerted, and cannot be questioned. (*The People v. Commissioners of Salem*, 1 Cow. 23; *The People v. Collins*, 19 Wend. 65.) Where the duty to be performed by the commissioners is *judicial*, they may be compelled, by mandamus, to meet and decide on the matter, but cannot be controlled as to the manner in which they shall decide; where the duty is ministerial they may be compelled to do the act which they are charged with unlawfully refusing to do. (*People v. Taylor*, 30 How. 78.) It is well settled that where the commissioners have a discretion in the performance of their duty, and proceed to exercise it, that discretion cannot be controlled by mandamus. But if they refuse to act or to entertain the question for their discretion in cases where the law enjoins upon them to do the act required, the court may enforce obedience to the law by mandamus, where no other legal remedy exists. (*Judges Oneida C. P. v. People*, 18 Wend. 96, and cases; *People v. Contracting Board*, 27 N. Y. R. 378; 33 N. Y. R. 382.)

A mandamus will lie to compel the commissioners to lay out or discontinue a highway. Thus, where the judges, on reversing the decision of the commissioners, refusing to discontinue one road and lay out another, ordered them to proceed and lay out and open the one road and to discontinue the other. It was held that obedience to the order could be compelled by mandamus. (*People v. Commissioners of Salem*, 1 Cow. 23.) So, a mandamus lies to compel commissioners to open so much of a road laid out by the judges, as has not been by them discontinued on a subsequent petition, although a certiorari is pending from

their determination discontinuing a *part* of such road. (*Ex parte Sanders*, 4 Cow. 544.)

So, when special commissioners were appointed by the Legislature to lay out a highway on the *most direct* and *eligible* route, commencing "at or near" the village of E, running in a southwesterly direction and terminating "at or near" the house of W; and the road was laid out by such special commissioners, commencing at the distance of sixty rods from the village, in a field where there was no road with which the new road could be connected, and the route, instead of being the most direct and eligible, was injudicious; yet, notwithstanding these facts, the court awarded a peremptory mandamus to the town commissioners of highways through which the road was laid out, to proceed forthwith to open and work the road as laid out by the State commissioners. (*People v. Collins*, 19 Wend. 56.) So where the commissioners of highways, on due application, refuse to lay out a road, and their determination is reversed on appeal, the judges or referees may proceed to lay out the road; and if the commissioners refuse to open the road so laid out a mandamus lies. (*People v. Champion*, 16 John. 61.)

Since the act of 1847 (*Laus* 1847, p. 580), appeals from the determination of commissioners of highways laying out, altering or discontinuing, or refusing to lay out, alter or discontinue any road, are to be heard and determined by referees appointed by the county judge. Such referees have all the power, and are charged with all the duties formerly possessed by the judges of Common Pleas; on reversing the determination of the commissioners, they should make such order in relation to laying out, altering, or discontinuing of the highway as in their judgment the commissioners should have made; and obedience to such order on the part of the commissioners may be compelled by mandamus. But if they simply reverse an order

refusing to lay out a highway, without giving further directions, the commissioners are not bound to lay out the highway, and a mandamus will not be granted to compel them to do it. (*People v. Commissioners of Highways*, 8 *N. Y. R.* 476.)

A mandamus to compel commissioners to open a road should not be resorted to where its necessary effect would be to subject them to an action of trespass; as where they have exceeded their jurisdiction in laying out such road. If, therefore, the facts shown on the application are of a character to establish a want of jurisdiction, so as to make the proceedings entirely void, they furnish a sufficient ground for not awarding a mandamus, unless for some good reason the parties are estopped from inquiring into these facts. (*People v. Commissioners of Seward*, 27 *Barb.* 94; *Ex parte Clapper*, 3 *Hill*, 458.) Nor will mandamus lie to compel the commissioners to repair the roads and bridges, unless they have funds for that purpose. (*Garlinghouse v. Jacobs*, 29 *N. Y. R.* 303, and cases cited.)

A mandamus to commissioners will be granted without regard to the near approach of the expiration of their term of office; when the term of office expires, their successors must obey the command of the writ. (*People v. Collins*, 19 *Wend.* 56.) The writ need not in the first instance be directed to the commissioners by their individual names; it is only in case of disobedience to the writ that they are to be proceeded against personally. (*People v. Champion*, 16 *John.* 61.)

15. INJUNCTION AGAINST.

Where the law gives to officers a power which implies and requires the exercise of a sound judgment and discretion, the correction of their errors belongs to the Supreme Court as a matter of legal, and not of equitable cognizance, and an injunction will not be proper. (*Thomp-*

son's Pro. Rem. 309.) An injunction cannot be granted to restrain commissioners of highways from carrying out an order made by them, removing an encroachment, whether on the ground that they had not jurisdiction, or that their decision was unjust or irregular. The remedy in such cases is by certiorari. (*Hyatt v. Bates*, 35 Barb. 308.) So, an injunction is not the proper remedy in a case where the commissioners would have the right to lay out a highway, but fail to acquire jurisdiction, or where their proceedings are irregular. (*Albany Northern Railroad Co. v. Brounell*, 24 N. Y. R. 345.) But where the commissioners have no right to lay out a road, as through a building, yard or enclosure, it seems an injunction may be had. Thus, where the commissioners were proceeding to lay out a highway through grounds acquired by a railroad company for the site of an engine house, and which were necessary for its use at a station, an injunction was granted. (*Id.*)

16. TO DELIVER BOOKS, PAPERS AND MONEYS TO SUCCESSOR.

At the expiration of the term of office of a commissioner of highways, it is his duty when requested, to deliver upon oath to his successor, all the records, books and papers in his possession or under his control belonging to the office, and, at the same time, to pay over to such successor the balance of moneys remaining in his hands, as certified by the auditor of the town accounts. (1 R. S. 359.) The oath above mentioned, may be administered by the officer to whom such delivery is made. (*Id.*) In case of the death of such commissioner, it is made the duty of his executors or administrators to make such delivery upon like oath. (*Id.*) If such commissioner, or in case of his death, his executors or administrators shall neglect or refuse, when lawfully requested to make such delivery, he shall forfeit to the town, for each offence, the sum of

two hundred and fifty dollars, and shall be deemed guilty of a misdemeanor. (1 R. S. 359, § 13; *Id.* 125.)

Delivery, how compelled.—The person entitled to receive such books, papers, etc., may compel a delivery of them in the manner following: He may make complaint of such refusal or neglect to any justice of the Supreme Court, or the county judge of the county where the person so refusing shall reside, and if such officer shall be satisfied, from the testimony offered, that any such books or papers are withheld, ~~he shall grant an order~~ directing the person ~~so~~ refusing to show cause before him, ~~within some~~ short and reasonable time, why he should not be compelled to deliver the same. If, upon an inquiry before such officer, the person charged with withholding such books or papers shall make affidavit that he has truly delivered over to his successor all such books and papers in his custody, or appertaining to his office, within his knowledge, all further proceeding before such officer shall cease, and the person complained against shall be discharged. If he does not make such oath, then the officer shall, by warrant, commit such person to the jail of the county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law. (1 R. S. 125.)

In case the person complained against shall not make such oath, such officer may, if required by the complainant, issue a warrant to a sheriff or constable, commanding him to search in the day time such places as shall be designated in such warrant, for such books and papers, and to seize and bring them before him. If the officer, upon examining such books and papers, shall conclude that they appertain to the office of commissioner of highways, he shall cause them to be delivered to the complainant. (*Id.*)

The same proceedings may be had against any third person who shall come in the possession of such books

and papers and refuse or neglect, upon a proper demand, to deliver them to the successor of the commissioner. (1 R. S. 125.) (For forms herein, see Appendix Nos. 20, 24.)

17. FEES OF COMMISSIONERS.

The commissioners of highways in any town in this State, where there is but one such officer, shall be allowed the sum of two dollars per day for each day actually and necessarily spent in the discharge of his official duties; and in towns where there are more than one commissioner, they shall receive for such official service each, the sum of one dollar and fifty cents, for each day actually and necessarily spent therein. (*Laws 1857, chap. 615, § 2.*) But where the commissioners are engaged under the act of 1858, "for the speedy construction and repair of roads and bridges, where the same shall have been damaged or destroyed" (see *ante p. 91*), they are entitled to a compensation of two dollars, for each day's service actually rendered, whether there be one or three commissioners. (*Laws 1865, chap. 442.*)

CHAPTER V.

OVERSEERS, THEIR POWERS AND DUTIES.

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| 1. Appointment and qualification. | 3. Penalties on overseer. |
| 2. General duties. | 4. To account annually; compensation. |

1. APPOINTMENT AND QUALIFICATION.

Prior to the year 1865, overseers of highways were chosen at the annual town meeting of each town (1 *R. S.* 340), but by a statute passed in that year (*Laws* 1865, *chap.* 522), it was provided, that the commissioner of highways in each town, within one week after the annual town meeting, by an instrument in writing, under their hands, to be filed with the town clerk, shall appoint as many overseers of highways in their respective towns, as there are road districts therein, to hold their office during one year. (For form of order appointing overseers, see Appendix No. 14.)

The overseers so appointed, have the same powers and duties, and are subject to the same laws as overseers elected previous to the passage of the act. (*Id.*)

Must be an elector.—No person is eligible to the office of overseer, unless he is an elector of the town for which he shall be appointed. (1 *R. S.* 345.)

Vacancy, how filled.—If any person appointed to the office of overseer of highways shall refuse to serve, or if his office shall become vacant, the commissioners of highways shall, by warrant under their hand, appoint some

other person in his stead; and the overseer so appointed shall have the same powers, be subject to the same orders, and liable to the same penalties as other overseers. (1 *R. S.* 504.) This does not authorize the commissioners to reappoint the same person, after his neglect or refusal to serve on the first appointment. They are to appoint some other person in his stead. (*Haywood v. Wheeler*, 11 *John.* 432.) (See form No. 15.)

Manner of appointing.—The statute requiring the commissioners to meet within one week after the annual town meeting, is directory merely, and it is probable that appointments made at a meeting held after the lapse of that time would not be void. The commissioners should all be notified to attend the meeting, and the object thereof should be fully set forth in the notice.

Two of them may sign the order appointing the overseers for the several districts, or to fill any vacancy. But it must appear in the order that all the commissioners met and deliberated on the subject embraced in the order, or were duly notified to attend the meeting for the purpose of deliberating thereon. (1 *R. S.* 525.)

The order must be definite and certain in this respect, and not leave anything to be implied. If it be made by two, and merely states that the third commissioner "was duly notified," without showing that the object of the meeting was also set forth in the notice, it will be void. (*Fitch v. Commissioners of Kirkland*, 22 *Wend.* 132; see *Marble v. Whitney*, 28 *N. Y. R.* 297.)

Order to be filed.—The order must be in writing, and must forthwith be filed with the town clerk by the commissioners. (1 *R. S.* 504.)

Notice of appointment.—Within ten days after such order is filed in the town clerk's office, such town clerk

must transmit to each person appointed overseer, a notice of his appointment. (1 *R. S.* 344; *Laws* 1865, *ch.* 522, § 7.) (See form No. 25.)

Notice of acceptance.—Every person so appointed, within ten days after he shall be notified of his appointment, and before he enters on the duties of his office, shall cause to be filed in the office of the town clerk, a notice in writing, signifying his acceptance of such office. (1 *R. S.* 345.) And in case he shall not cause such notice of acceptance to be filed, such neglect shall be deemed a refusal to serve. (*Id.*) (See form No. 26.)

Penalty for refusing to serve.—If any person appointed to the office of overseer of highways, either to fill a vacancy or otherwise, shall refuse to serve, he shall forfeit to the town the sum of ten dollars (1 *R. S.* 347), to be recovered by the commissioners, and by them applied in improving the roads and bridges. (1 *R. S.* 526.) Although it is provided that neglect to file notice of acceptance shall be deemed a refusal to serve, yet, it is probable, that such neglect is only to be regarded as *prima facie* evidence of such refusal, which may be rebutted by the acts of the person appointed or otherwise, as by his proceeding to perform the duties of the office. An act passed in 1863 (*Laws* 1863, *chap.* 444), is strongly confirmatory of this view, for it provides, that the acceptance of the assessment list by any overseer to whom the same may be delivered, shall be deemed conclusive evidence that such overseer is duly chosen or appointed to such office, although the acceptance above required has not been filed. So, in *Winnegar v. Roe* (1 *Cow.* 258), under a former provision, that a neglect on the part of a person chosen overseer of the highways to signify his acceptance in writing within fifteen days, shall

"be considered a refusal to serve, and the city or town may proceed to a new choice; *and, in every such case*, the person refusing to take upon himself such office, shall forfeit twelve dollars and a half," it was held, that a person who had neglected to file such notice of acceptance, had not incurred the penalty, inasmuch as he had performed the duties of his appointment, and the town had not deemed it necessary to proceed to elect another.

2. GENERAL DUTIES.

It shall be the duty of overseers of highways in each town:

1. To repair and keep in order the highways within the several districts for which they shall have been chosen.

2. When so required by the commissioners of highways, or any one of them, to warn all persons assessed to work on the highways in their respective districts to come and work thereon.

3. To cause the noxious weeds on each side of the highway within their respective districts to be cut down or destroyed twice in each year, once before the first day of July, and again before the first day of September; and the requisite labor shall be considered highway work; and

4. To collect all fines and commutation money, and to execute all lawful orders of the commissioners. (1 R. S. 503.)

Removing stones, etc.—It shall be the further duty of the overseers of highways, once in every month, from the first day of April until the first day of December, to cause all the loose stones lying on the beaten track of every road within their respective districts to be removed; and to cause the monuments erected, or to be erected as the boundaries of highways, to be kept up and renewed, so that the extent of such roads may be publicly known. (1 R. S. 503.)

Subordinate to commissioners.—"The overseer," says Chancellor KENT, in *Bartlett v. Crozier*, (17 John. 447,) "is a mere subordinate agent to execute the orders of the commissioners of highways, and his duty so far consists principally in warning persons to work, and in collecting fines and commutation money. It is, indeed, said to be the duty of overseers to repair and keep in order the highways, but the first section (*ante p.* 65) has already made it the duty of the commissioners to give directions relative to the repairing of roads and bridges, and to cause the highways and bridges to be kept in repair. It cannot have been intended to be the equal and concurrent duty of the commissioners and the overseers to do the same thing, for their orders and acts might interfere and come in collision with each other. All the powers of the overseers must, therefore, be taken to be subordinate to, and under the superior control of, the orders of the commissioners, whom they are bound to obey. It is further to be observed that the duty of the overseers in these two sections is confined to the highways; and it is the commissioners alone who are directed to keep in repair bridges as well as highways. The overseers have no concern with bridges erected over streams, except so far as they are directed generally to execute the orders of the commissioners."

To remove obstructions, &c., without orders.—Some of the duties of overseers are to be performed without any special order or directions from the commissioners; it is their duty, among other things, to keep the road in repair, to destroy noxious weeds, to collect fines and commutation money, and to remove loose stones from the beaten track of the road, without any special order from the commissioners. But it would seem that they are not to warn persons assessed to work without being required by the commissioners to do so; but this requisition relates to the

general warrant or assessment roll directed to them by the commissioners. The overseer is likewise bound to remove all obstructions from the highways within his district, without special direction so to do from the commissioners; and a neglect to perform his duty in this respect subjects him to the penalty attached. (*M'Fadden v. Kingsbury*, 11 *Wend.* 667.)

Duty in repairing roads.—The overseers, in repairing and keeping in order highways, are subject to the orders of the commissioners, but they are not relieved from the duty in the absence of such orders. For any neglect of such duty, it is no answer to say that the commissioners have the care and superintendence of the highways, and give direction for the repairing of roads and bridges; it is none the less the duty of the overseers to repair and keep in order the roads in their districts; they are bound to do it, whether they receive special instructions or not. (*M'Fadden v. Kingsbury*, 11 *Wend.* 667.) They are to keep the highways in a proper state of repair, and free from all obstruction or defects in the road bed which vigilance and care can detect and remove. (*Wendell v. Mayor of Troy*, 39 *Barb.* 335.) It is their duty to provide a pathway for carriages of suitable width, and to so define it that there shall be no reasonable danger of its being mistaken; but they are not required to grade the whole space within the limits of the highway so that travellers can safely drive over every part of it. Where a road is so constructed or altered as to present at one point two paths, both of which exhibit the appearance of having been used by travellers, and one of them leads to a dangerous precipice, while the other is quite safe, it is the duty of the overseer to indicate, in a manner not to be mistaken by day or night, that the unsafe path is to be avoided; and if it cannot be otherwise done to put up such an

obstruction as will turn the traveller from the wrong track. (*Ireland v. Oswego, &c., Plank-road Co.* 13 *N. Y. R.* 531.) Their duty as to repair of roads does not extend merely to the bed of the roads, but they are also to provide proper guards or railings on their sides or borders, where necessary for the safety or protection of the public. (*Hyatt v. Trustees of Rondout*, 44 *Barb.* 391.)

Bridges.—The duties of overseers is confined to highways; they have no concern with bridges erected over streams, except so far as they proceed under the special order of the commissioner. It is the business of the commissioners to keep the bridges in repair, either by direct personal action and supervision, or by orders to the overseers. (*Bartlett v. Crozier*, 17 *John.* 447.) What shall be deemed a bridge in this connection must depend upon the circumstances of each case. While it is not the duty of overseers, without special orders, to repair bridges over large streams, yet culverts or sluices over small brooks or streams, and even bridges of some extent in a road district are undoubtedly under the care of the overseers, and are to be by them repaired without special directions.

Not bound to repair without funds.—There is no duty attaching to overseers to repair roads, until they are supplied with the necessary funds wherewith to make such repairs, and they are, therefore, not liable to a private action for any damage that may arise from the roads in their district being out of repair, unless they have the requisite means to make the repairs. (*Garlinghouse v. Jacobs*, 29 *N. Y. R.* 297; *People v. Adsit*, 2 *Hill*, 619; *Barker v. Loomis*, 6 *Hill*, 463; *Bartlett v. Crozier*, 17 *John.* 447.) And it is thought that they are not liable to such action, even when they have the requisite funds wherewith to make such repairs. (*Garlinghouse v. Jacobs*,

supra, per WRIGHT, J.) In most of these cases, the question was, as to the liability of commissioners, but the principle is equally applicable to overseers.

So, no civil action will lie against an overseer, at the suit of an individual for an injury sustained, in consequence of the neglect of the overseer to keep a bridge in repair. (*Bartlett v. Crozier*, 17 *John*. 439.)

But a party injured by reason of a road's being out of repair, can sue for the penalty imposed by the statute for neglect or breach of duty; so, also, for an injury sustained by reason of a bridge being out of repair, where it is shown that the commissioners had given specific orders for the repair of such bridge, and that the overseers had the funds necessary to make such repair. (See *Bartlett v. Crozier*, *supra*.)

Indictment.—An indictment will lie against overseers for a willful neglect to keep the roads in repair, within the provision of 2 *R. S.* 696, § 38, which declares, that where any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, shall be punishable as a misdemeanor.

Guide-posts and mile boards.—It is also the duty of overseers to erect guide posts and mile boards, with proper inscriptions and devices at the intersection of roads, when ordered so to do, and to maintain and keep in repair such guide-posts at the expense of the town (1 *R. S.* 503.) If any person shall destroy, remove, injure or deface such mile boards or guide posts, he shall forfeit for each offence the sum of ten dollars, and be deemed guilty of a misdemeanor, and on conviction, shall be fined not exceeding

fifty dollars, or imprisoned not exceeding three months, at the discretion of the court. (1 R. S. 525, § 128.)

Scraper and plough.—Every overseer is also, when ordered by the commissioners, to purchase a good and sufficient iron or steel shod scraper and plough, or either of them, for the use of his road district; to be paid for by the moneys arising from commutations and fines within his district. In case such money shall be insufficient for the purpose, the deficiency shall be assessed by the overseer upon the inhabitants of the district in the proportion they are respectively assessed on the assessment roll of said town; and if any one so assessed shall neglect or refuse to pay such assessment, the same may be sued for and recovered by the overseers. (1 R. S. 504.) (For form of assessment, see Appendix No. 27.)

They are not obliged to erect mile boards, guide posts, or to procure a scraper or plough, unless directed and empowered by the commissioners to do so; and if prosecuted for the penalty for refusal or neglect to procure such scraper or plough, or to erect such guide posts and mile boards, the order directing them so to do must be strictly proved, as it is the foundation of the action. (*McFadden v. Kingsbury*, 11 Wend. 667.)

List of inhabitants.—Each of the overseers of highways shall deliver to the clerk of the town, within sixteen days after his election or appointment, a list subscribed by such overseer of the names of all the inhabitants in his road district who are liable to work on the highways. This list is to be delivered by the town clerk to the commissioners, and is to be used by them as a basis of their assessments for highway labor. (1 R. S. 506.)

This list is to include the names of all persons, male or female, owning or occupying lands in the road district, and

of every male inhabitant above the age of twenty-one years residing in the district when the list is made. (1 *R. S.* 505, § 19.) It need not, however, include the names of ministers of the gospel, nor of priests of any denomination, nor of paupers, idiots or lunatics, unless they are land owners, since they are excepted from the number of persons that are to be assessed for *per capita* highway labor. (1 *R. S.* 507, § 24.) But the names of ministers and priests should not be omitted unless they are engaged in religious teaching as a business. Those who have abandoned or retired from the calling, and those who do not make it a profession, but only teach or exhort occasionally, are not entitled to such exemption. Nor is it essential that the list contain the names of non-residents owning land in the district, since it is the duty of the commissioners to prepare a list of them; but it would be well for the overseers to add to their lists the names of such non-residents that the commissioners may have all needful information on the subject. (See form No. 28.)

3. PENALTIES ON OVERSEERS.

Every overseer of highways who shall refuse or neglect either:

1. To warn the people assessed to work on the highways, when he shall have been required so to do by the commissioners, or either of them.
2. To collect the moneys that may arise from fines or commutations; or,
3. To perform any of the duties required by this chapter, or which may be enjoined on him by the commissioners of highways of his town; and for the omission of which a penalty is not hereinafter provided, shall for every such refusal or neglect, forfeit the sum of ten dollars, to be sued for by the commissioners of highways of the town; and when recovered, to be applied by them in making and

improving the roads and bridges therein. (1 *R. S.* 504, § 16.)

Some of the duties of overseers are to be performed without any order from the commissioners, and a neglect or refusal to perform them, renders the overseers liable, irrespective of any such order; while in other cases, they can only be made liable by showing that they have been ordered by the commissioners to perform the duties which it is alleged they have neglected or refused to perform. Thus, it is their duty, without special directions, to keep the roads in repair, to destroy noxious weeds, to collect fines and commutation money, and to remove loose stones from the beaten track of the road.

But they must be specially required by the commissioners, to warn persons assessed to work, to procure scrapers or ploughs, or to repair bridges over streams, before they can be made liable to the penalty for a neglect or refusal. And, in the latter case, the notice or order from the commissioners must be proved, since it forms the basis of the action, and it must be produced and given in evidence or its non-production accounted for. It cannot be proved by *parol*, unless all necessary steps have been taken to produce the notice or order itself, and it could not be had. (*McFadden v. Kingsbury*, 11 *Wend.* 669.) The delivery of the assessment roll will be a sufficient requisition to warn the people assessed to work. The overseers are also bound to remove obstructions from the highways in their district, although not specially directed so to do by the commissioners. (*Id.*) But they are not bound to the reparation of bridges, without special orders, since that duty has been confided to the commissioners. (*Bartlett v. Crozier*, 17 *John.* 439.)

How recovered.—The penalty provided above, is to be prosecuted for by the commissioners, upon the complaint

of a resident of the town, and an offer of indemnity for costs; and if the commissioners shall neglect or refuse to prosecute therefor, they shall forfeit, in each case, the sum of ten dollars, to be recovered by the person who made the complaint and offered the indemnity. (1 *R. S.* 505, §§ 17, 18.) (See *ante p.* 94.) (For form of complaint and bond of indemnity, see Appendix Nos. 16 and 17.)

Other penalties.—Overseers are liable to a penalty of ten dollars, and also the amount of tax or taxes for labor remaining unpaid, at the rate of one dollar for each day assessed, for omitting to furnish to the supervisor the required list of the labor not performed in their district. (See *chapter VII.*) They are also liable to a penalty of ten dollars, for neglecting or refusing to render an annual account to the commissioners, and to pay over any balance which may be due from him. These penalties are to be prosecuted for and recovered by the commissioners, and applied to making and improving the roads and bridges in the district wherein the delinquent overseer resides. (1 *R. S.* 511, §§ 48 and 53, as amended 1865, *chapter* 522.)

4. TO ACCOUNT ANNUALLY. COMPENSATION.

Every overseer of highways shall, on the second Tuesday next preceding the time of holding the annual town meeting in his town, within the year for which he is elected or appointed, render to one of the commissioners of highways of the town, an account in writing, verified by his oath, and containing:

1. The names of all persons assessed to work on the highways, in the district of which he is overseer.
2. The names of all those who have actually worked on the highways, with the number of days they have so worked.

3. The names of all those who have been fined, and the sum in which they have been fined.

4. The names of all those who have commuted, and the manner in which the moneys arising from fines and commutations have been expended by him.

5. A list of all persons whose names he has returned to the supervisor, as having neglected or refused to work out their highway assessments, with the number of days and amount of tax so returned for each person, and a list of all lands which he has returned to the supervisor for non-payment of taxes, and the amount of tax on each tract of land so returned. (1 R. S. 512, § 51, as amended 1865, ch. 522.) The commissioners of highways are authorized to administer the oath required to the above account. (*Laws* 1833, ch. 149.) (For form of account, see Appendix 29.)

To pay over moneys.—Every such overseer shall also, then and there, pay to the commissioner all moneys remaining in his hands unexpended, to be applied by the commissioners in making and improving the roads and bridges in the town in such manner as they shall direct. (1 R. S. 512, § 52.)

The commutation money received by the overseers from all moneyed or stock corporations is to be by them paid over to the commissioners at any time on demand; but the commutation moneys received from residents and non-residents are to be applied by the overseer in the improvement and repair of the roads, and cannot be claimed by the commissioners until the overseer's term has expired, and he has accounted. (*Fowler v. Westervelt*, 40 Barb. 374.)

Penalty for neglecting to account.—If any overseer shall refuse or neglect to render such account, or if having rendered the same he shall refuse or neglect to pay any

balance which may then be due from him, he shall for every such offence forfeit the sum of ten dollars, to be recovered, together with any balance of moneys remaining in his hands, by the commissioners of highways, to be applied to making and improving the roads and bridges in said district; and it shall be the duty of said commissioners to prosecute for such penalty in every instance in which no return is made, or such delinquency occurs. (1 R. S. 512, § 53, as amended 1865, *ch.* 522.) The action for this penalty is to be brought by the commissioners in their own names, with the addition of their official title.

Compensation.—If any overseer shall be employed more days in executing the several duties enjoined on him by this chapter, than he is assessed to work on the highways, he shall be paid for the excess at the rate of one dollar per day, and be allowed to retain the same out of the moneys which may come into his hands for fines under this chapter; he shall not be permitted to commute for the days he is assessed. (1 R. S. 504, § 13, as amended 1864, *ch.* 395.)

The powers and duties of overseers in regard to assessments and labor on highways will be fully treated of in the following two chapters.

CHAPTER VI.

ASSESSMENT OF HIGHWAY LABOR.

Within sixteen days after their appointment each overseer is to prepare and deliver to the town clerk a list, subscribed by such overseer, of the names of all the inhabitants in his road district who are liable to work on highways. (1 R. S. 506.) This list is to be delivered by the town clerk to the commissioners of highways of the town; who shall proceed at their next meeting, or at some subsequent meeting, to ascertain, estimate and assess the highway labor to be performed in their town the then ensuing year. (*Id.* § 23.)

• *Commissioners to meet.*—The commissioners are to meet for the purpose of receiving such list, and to make the assessment, within eighteen days after they shall be chosen, at the place of town meeting. And they shall meet afterwards at such times and places as they shall think proper. (1 R. S. 505, § 20.) If there is but one commissioner, he should attend at the place where the town meeting was held within the same time.

It is not essential that the commissioners should perform any business at this meeting; they may adjourn to some other time and place. And it is quite probable that, if their first meeting were after the eighteen days, their proceedings would not be void, since the section must be regarded as directory merely.

Who liable to assessment.—Every person owning or occupying land in the town in which he or she resides, and

every male inhabitant above the age of twenty-one years residing in the town, when the assessment is made, shall be assessed to work on the public highways in such town; and the lands of non-residents, situated in such town, shall be assessed for highway labor as hereinafter directed. (1 *R. S.* 505, § 19.) Ministers of the gospel and priests of every denomination, paupers and idiots and lunatics, are not included among the number liable to be assessed unless they have lands. A question was raised in *Beach v. Furman*, (9 *John.* 229,) whether a female, though a freeholder, was liable to a highway assessment. To obviate that question the above section was made explicit, by inserting the words *he* or *she* by the Legislature. (See *Revisor's notes on this section.*) Females are now liable to be assessed on their property, and males are liable to a tax both on their property and *per capita*.

Non-residents.—Lands of non-residents within any town, occupied and improved by the owner or owners, or his or their servants or agents, shall be liable to the same assessments for highways as if the owner or owners were residents. (*Laws* 1832, *ch.* 107, § 1.) The real property of non-resident owners, improved or occupied by a servant or agent, shall be subject to assessment of highway labor, and at the same rate as the real property of resident owners. (*Laws* 1835, *ch.* 154, § 1.) So all moneyed or stock corporations which shall appear on the last assessment roll of the town to have been assessed therein, are liable to be assessed for highway labor. (*Laws* 1837, *ch.* 431, § 1.) This statute was passed subsequent to the decision in the case of the *Bank of Ithaca v. King*, (12 *Wend.* 390,) which held that moneyed corporations were not liable to be assessed to work on the public highway, and is a legislative overruling of that decision.

Non-residents, how assessed.—The commissioners of highways in each town, at their first or any subsequent meeting, shall make out a list and statement of the contents of all lots, pieces or parcels of land within such town owned by non-residents therein; every lot so designated shall be described in the manner as is required from assessors, and its value shall be set down opposite to such description; such value shall be the same as was affixed to such lot in the last assessment roll of the town; and if such lot was not separately valued in such roll, then in proportion to the valuation which shall have been affixed to the whole tract of which such lot shall be a part. (1 R. S. 506, § 22, as amended 1835, ch. 154, § 2.) (See form No. 30.)

In making such assessment the commissioners can have the use of the assessment roll deposited with the town clerk. They should follow the assessment roll, except where they are bound to make a proportion, and then they should be very particular in their description of the proportion.

The manner in which assessors are required to describe non-resident lands is as follows:

The lands of non-residents shall be designated in the same assessment roll, but in a part thereof separate from the other assessments, and in the manner prescribed in the two following sections. (1 R. S. 391, § 11.)

If the land to be assessed be a tract which is subdivided into lots, or be part of a tract which is so subdivided, the assessors shall proceed as follows:

1. They shall designate it by its name, if known by one, or if it be not distinguished by name, or the name be unknown, they shall state by what other lands it is bounded.

2. If they can obtain correct information of the subdivision they shall put down in their assessment rolls, and in a first column, all the unoccupied lots in their town or

ward owned by non-residents, by their numbers alone, and without the names of their owners, beginning at the lowest number and proceeding in numerical order to the highest.

3. In a second column, and opposite to the number of each lot, they shall set down the quantity of land therein liable to taxation.

4. In a third column, and opposite to the quantity, they shall set down the valuation of such quantity.

5. If such quantity be a full lot, it shall be designated by the number alone; if it be a part of a lot, the part must be designated by boundaries, or in some other way by which it may be known. (*Id.* § 12.)

If the land so to be assessed be a tract which is not subdivided, or if its subdivisions cannot be ascertained by the assessors, they shall proceed as follows:

1. They shall enter in their roll the name or boundaries thereof, as above directed, and certify in the roll that such tract is not subdivided, or that they cannot obtain correct information of the subdivision, as the case may be.

2. They shall set down in the proper column, the quantity and valuation as above directed.

3. If the quantity to be assessed be the whole tract, such a description by its name or boundaries will be sufficient; but if a part only is liable to taxation, that part or the part not liable, must be particularly described.

4. If any part of such tract be settled and occupied by a resident of the town or ward, the assessors shall except such part from their assessment of the whole tract, and shall assess it as other occupied lands are assessed; and if they cannot otherwise designate such parts, they shall notify the supervisor of the town, who shall cause a survey and two manuscript maps to be made, for the purpose of ascertaining the situation and quantity of every such occupied part.

5. One of those maps shall be delivered by the super-

visor to the county treasurer, to be by him transmitted to the comptroller, and the other shall be delivered in like manner to the assessors.

6. The assessors shall then complete the assessment of the tract, and shall deposit the map in the town clerk's office, for the information of future assessors. And the expense of making such survey and map shall be immediately repaid to the supervisor, out of the county treasury, and shall be added by the board of supervisors to the tax on the tract, distinguishing it from the ordinary tax. (*Id.* § 13.)

When it shall be deemed necessary by the assessors of any town to have an actual survey made, to ascertain the quantity of any lot or tract of non-resident lands which is divided by the town line, they shall notify the supervisor, who shall cause the necessary surveys to be made at the expense of the town. (*Id.* § 14.)

How to proceed in making assessments.—In making their estimates and assessments the commissioners shall proceed as follows:

1. The whole number of days' work to be assessed in each year shall be ascertained, and shall be at least three times the number of taxable inhabitants in such town.

2. Every male inhabitant being above the age of twenty-one years (excepting ministers of the gospel, and priests of every denomination, paupers and idiots and lunatics), shall be assessed at least one day.

3. The residue of such days' work shall be apportioned upon the estate, real and personal, of every inhabitant of such town, as the same shall appear by the last assessment roll of the said town, and upon each tract or parcel of land, of which the owners are non-residents, contained in the list made as aforesaid.

4. If, after such apportionment, there should be any

deficiency in the number of days' work determined by the commissioners to be performed in their town the then ensuing year, such deficiency shall be assessed upon the estates, real and personal, of the inhabitants of the town, and upon each tract or parcel of land of which the owners are non-residents, according to the last assessment roll.

6. The commissioners shall affix to the name of each person named in the list furnished by the overseers, and also to the description of each tract or parcel of land contained in the list prepared by them of non-resident lands, the number of days which such person or tract shall be assessed for highway labor, as herein directed; and the commissioners shall subscribe such lists and file them with the town clerk. (1 R. S. 507, § 24, *as amended in 1835*, ch. 154. § 3.) (See forms Nos. 30, 31.)

Three times the number of taxable inhabitants is the least number of days to be assessed; and the commissioners have power to make it as many more days as they shall deem necessary. There seems to be no limit to their discretion in this particular. Every male above the age of twenty-one years (excepting ministers, priests, paupers, idiots and lunatics), are to be assessed *per capita* at least one day. Females are, of course, not included in this *per capita* or poll tax. Ministers or priests are not to be excepted unless they are engaged in religious teaching as a business; those who have abandoned or retired from the calling are not to be exempted, even though they occasionally teach or exhort. An idiot is one that has had no understanding from his infancy; a man is not an idiot if he has any glimmering of reason, so that he can tell his parents, his age, or the like common matters. (*Black. Com.* 303.) A lunatic is one who has had understanding, but by disease, grief or other accident has lost the use of his reason; the fact that he has lucid intervals does not alter the case. (*Id.*)

The number of days assessed on the male inhabitants is to be deducted from the whole number of days' work to be assessed in the town, and the balance of such days is to be apportioned upon the estate, real and personal, of the inhabitants, non-resident land owners, and moneyed and stock corporations.

Corporations.—In making the estimate and assessment of the residue of the highway labor to be performed in their town, after assessing at least one day's work upon each of the male inhabitants therein, above the age of twenty-one years, as provided in the sixteenth chapter of the first part of the Revised Statutes, entitled "of Highways and Bridges," the commissioners of highways shall include among the inhabitants of such town, among whom such residue is to be apportioned, all moneyed or stock corporations which shall appear on the last assessment roll of their town to have been assessed therein. (*Laws 1837, ch. 431, § 1.*) (See form No. 31:)

Under this provision the commissioners are to follow the previous action of the assessors. They are not to assess such corporations as are situated in their town, or such as may properly be considered inhabitants of such town. They are to take the last assessment roll for a guide, and to include in their assessment every corporation which they find assessed therein; and they cannot tax by name, as an inhabitant of the town, any corporation which is not so assessed upon the roll. The highway law itself affords no rule or principle for discriminating between such corporations as are and such as are not taxable in the towns, nor between such portions of the property of the corporations as may or may not be thus taxable. The highway law does not even direct the commissioners to include in their assessment such corporations, or such corporate property as ought to be, or to have been, taxed in the

town and upon the last preceding assessment. The rule for the commissioners is to ascertain whether the corporation appears in the assessors' roll, not whether it ought to appear there. The error, if there be one, can only be corrected by correcting the town roll. (*People v. Pierce*, 31 Barb. 138.)

Associations formed under the general banking law are moneyed or stock corporations and liable to taxation. (*People v. Supervisors of Niagara*, 4 Hill, 20; 7 Hill, 504.) Railroad companies are not taxed upon their capital, but upon the valuation of their real estate in the several towns through which the road passes. (*Mohawk and Hudson R. R. Co. v. Olute*, 4 Paige, 384; *People v. Supervisors of Niagara*, *supra*.)

Private roads.—It shall be the duty of the commissioners of highways of each town to credit such persons as live on private roads, and work the same, so much on account of their assessments as such commissioners may deem necessary to work such private road, or to annex such private roads to some of the highway districts. (1 R. S. 507, § 29.)

Separate assessments.—Whenever the commissioners of highways shall assess the occupant for any land not owned by such occupant, they shall distinguish in their assessment lists the amount charged upon such land, from the personal tax, if any, of the occupant thereof. But when any such land shall be assessed in the name of the occupant, the owner thereof shall not be assessed during the same year to work on the highways on account of the same land. (1 R. S. 508, § 30.)

Assessment for labor on plank-roads.—Every person liable to do highway labor, living or owning property on

the line of any plank-road of this State, may, on making application in writing, to the commissioner or commissioners of their respective towns, on or before any day previous to the time of making the highway warrants by such commissioners, be assessed the apportionment of highway labor, for such property upon such plank-road; and the commissioner or commissioners shall assess such person for the land or property owned by him in or upon the line of said plank-road as a separate road district. (*Laws 1853, ch. 626, § 1, as amended 1855, ch. 495.*)

It shall be the duty of the highway commissioner or commissioners of such town to make a separate list of such persons and such land or property so assessed, as commissioners are now by law required to make for every separate road district, which shall be delivered to some one of the directors of such road, who shall proceed to have said highway labor worked on such road, in the same manner that overseers of highways are required by law to do. (*Id.* § 2.)

The said directors shall possess all the powers and have the same authority to compel the performance of such highway labor, or the payment of such highway tax, as the overseers of highways now have by law, and shall make like returns to the commissioners of highways. (*Id.* § 3.)

Any person so assessed may commute for the tax assessed, upon him or his property, by paying the sum now fixed by law to any of said directors. (*Id.* § 4.)

Where assessors have omitted to assess.—Whenever the assessors of any town shall have omitted to assess any inhabitant or property in such town, the commissioners of highways shall assess the persons and property so omitted, and shall apportion highway labor upon such persons or property in the same manner as if they had been duly

assessed upon the last assessment roll. (*Laws* 1837, ch. 431, § 6.)

Lists to be filed.—The commissioners shall affix to the name of each person named in the list furnished by the overseers, and to the description of each tract or parcel of land contained in the list prepared by them of non-resident lands, the number of days which such person or tract shall be assessed for highway labor, as herein directed; and the commissioners shall subscribe such lists and file them with the town clerk. (1 R. S. 507, § 24, sub. 5, as amended 1835, ch. 154, § 3.)

Copy of list.—The commissioners of highways shall direct the clerk of the town to make a copy of each list, and shall subscribe such copies, after which they shall cause the several copies to be delivered to the respective overseers of highways of the several districts in which the highway labor is assessed, and the acceptance of such list by any overseer to whom the same may be delivered, shall be deemed conclusive evidence that such overseer is duly chosen or appointed to such office, although the acceptance required by section eighteen, article two, title three, chapter eleven (see *ante* p. 113), has not been filed as required by said section. (1 R. S. 507, as amended 1863, ch. 444.)

Names omitted.—The names of persons left out of any such list, and of new inhabitants, shall from time to time be added to the several lists, and they shall be rated by the overseer in proportion to their real and personal estate, to work on the highways, as others rated by the commissioners on such list, subject to an appeal to the commissioners. (1 R. S. 507, § 26.) (See form No. 32.)

Appeals by non-residents.—Whenever any non-resident owner shall conceive himself aggrieved by the assessments of any commissioners of highways, in carrying into effect the provisions of this article, it shall be lawful for such owner, or his agent, within thirty days after such assessment, to appeal to the county judge of the county in which such land is situated. (1 R. S. 507, § 27, as modified by Laws 1847, ch. 280, § 29, and Code § 30, sub. 11.) The appeal must be taken within thirty days after the assessment is actually made, and the list signed by the commissioners. (See form No. 33.)

Proceedings thereon.—It shall be the duty of such judge, within twenty days thereafter, to decide on such appeal, the said owner or agent giving notice to the commissioners of the time of the meeting of the judge; and his decision shall be final and conclusive in the premises. Each judge shall be entitled to receive for his services on such appeal two dollars for each day he may be employed thereon, to be paid by the party appealing, if the proceedings of the commissioners and overseers shall be affirmed; but if reversed or modified favorable to the party appealing, to be levied and paid as part of the contingent expenses of such town. (1 R. S., 507, § 28, as modified by Laws 1847, ch. 280, § 29.) By chapter 564 of the Laws of 1857, county judges are no longer allowed to receive fees except for services which may be performed by justices of the peace and commissioners of deeds.

Tenant to deduct assessment.—Whenever any tenant of any land for a less term than twenty-five years shall be assessed to work on the highways, for such land pursuant to the last preceding section, and shall actually perform such work, or commute therefor, he shall be entitled to a deduction from the rent due, or to become due, from him,

for such land, equal to the full amount of such assessment, estimating the same at the rate of one dollar per day, unless otherwise provided for by covenant or agreement between such tenant and his landlord. (1 *R. S.* 508, § 31, *as amended* 1864, *ch.* 395.)

Grading, &c., road.—It shall be lawful for the inhabitants residing in any road district in this State, to grade, gravel or plank the road or roads in such district, by anticipating the highway labor of such road district for one or more years, and applying it to the immediate construction of such plank or gravel road; and after the completion of such plank or gravel road the said inhabitants shall be exempted from the labor so anticipated and applied, except so far as their labor may be necessary to keep their said road or roads in repair; such road to be in all cases a free road. (*Laws* 1849, *ch.* 250, § 12.)

Errors how corrected.—Where the highway commissioners shall err in their assessment, such error is to be corrected by *certiorari*. (*Thomp. Pro. Rem.* 310.)

Additional assessment by overseer.—When the quantity of labor assessed on the inhabitants of any road district by the commissioners, shall be deemed insufficient by the overseer of such district, to keep the roads therein in repair, it shall be the further duty of such overseer to make another assessment on the actual residents in such district in the same proportion, as near as may be, and not exceeding one-third of the number of days assessed in the same year by the commissioners, on the inhabitants of such district; and the labor so assessed by an overseer shall be performed or commuted for, in like manner as if the same had been assessed by the commissioners of highways. (1 *R. S.* 503, § 8.) (See form 91.)

CHAPTER VII.

PERFORMANCE OF HIGHWAY LABOR.

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| 1. Notice to work on highways. | 6. Penalties against corporations and how collected. |
| 2. Commuting for labor. | 7. Annual return of overseers. |
| 3. Teams, etc., substitutes, hours to work. | 8. Rights and liabilities in performance of labor. |
| 4. Penalties for not working, how collected. | |
| 5. Proceedings to collect non-resident labor unpaid. | |

1. NOTICE TO WORK ON HIGHWAYS.

The assessment lists for labor on highways having been prepared by the commissioners, copied by the town clerk, and subscribed by the commissioners, are to be delivered to the respective overseers of highways of the several districts in which the highway labor is assessed, and the overseers are thereupon to proceed to cause the labor assessed to be performed in their several districts. The delivery of the assessment roll to the overseer will be a sufficient order to warn persons assessed to work on the highways. The manner in which they are to proceed is as follows:

Notice to persons assessed.—It shall be the duty of the overseers of highways to give at least twenty-four hours' notice to all persons assessed to work on the highways, and residing within the limits of their respective districts, of the time and place, when and where they are to appear for that purpose, and with what implements; but no person being a resident of the town shall be required to work on any highway other than in the district in which he

resides, unless he shall elect to work in some district where he has any land; and in such case he may, with the approbation of the commissioners of highways, apply the work assessed in respect to such land in the district where the same is situated. (1 R. S. 508, § 32.) The notice to work need not be in writing. Where a person elects to work in a district where he has lands, but does not reside, he should, to avoid any controversy, obtain the written consent of the commissioners. After working the required number of days, he should bring a receipt or certificate to that effect from the overseer of the district where the labor is performed to the one where he resides, who will give him credit accordingly. By an act of 1866 (*ch.* 770), it was provided that "from and after the passage of this act the highway tax upon any land or property (except as provided in section two of this act), shall be worked out or commuted for in the district in which said land or property is situated; and if commuted for, the money shall be paid to the overseer of said district for the benefit of the roads and bridges in said district; but this act shall not apply to or affect any county, city, village, town or district where the disposition of the highway tax has been provided for by a special enactment." By some blunder on the part of the Legislature no exceptions were provided in the second section, so that the act is universal in its application. (For consent of commissioners, see form No. 34.)

Notice to agent.—It shall be the duty of the several overseers of highways to notify the agent of every non-resident landholder, whose lands are assessed (if such agent resides in the town where such assessment is made), of the number of days such non-resident is assessed, and of the time when, and the place where the labor is to be

performed; which notice shall be given at least five days previous to the time appointed. (1 R. S. 509, § 33.)

If the overseer cannot ascertain that such non-resident has an agent within such town, he shall affix a written notice on the outer door of the building in which the last town meeting in such town was held, containing a list of the names of such non-residents, when known, and a description of the tracts of land comprised in his list, together with the number of days' labor assessed on each tract, and a specification of the time when, and place where such labor is to be performed; which notice shall be posted at least twenty days before the time appointed for performing such labor. (*Id.* § 34.) Where the agent can be found it is not necessary that the notice be in writing, although it would be proper to have it in writing. (See form No. 35.)

Notice to corporations.—Moneyed or stock corporations shall be notified to furnish the amount of highway labor assessed to them in the same manner as individuals residing in such town, by giving oral or written notice to the president, cashier, agents, treasurer or secretary of such corporation, or any clerk or other officer thereof, at the principal office or place of transacting the business or concerns of the said company; which labor shall be performed in such district or districts as the commissioners of highways of the town shall direct; and any number of days' work, not exceeding fifty, may be required to be performed by any such corporation in any one day. (*Laws 1837, ch. 431, § 2.*)

2. COMMUTING FOR LABOR.

Every person liable to work on the highways shall work the whole number of days for which he shall have been assessed; but every such person, other than an overseer,

may elect to commute for the same, or for some part thereof, at the rate of one dollar for each day; in which case such commutation money shall be paid to the overseer of highways of the district in which the person commuting shall reside, to be applied and expended by such overseer in the improvement of the roads and bridges in the same district. (1 R. S. 509, § 35.)

Deductions are to be made according to the following statute: Every non-commissioned officer and musician who shall produce to the overseer of highways, or person authorized to receive commutation for highway taxes, a certificate from the commandant of his company of his being equipped and having done military duty, as required by law, for the preceding year, shall be entitled to a deduction from his labor on the highways, or from his commutation for such labor of two days. (1 R. S. 324, § 4.) Overseers cannot commute, but are required to work out their tax personally, that they may be present and superintend the labor of others.

Every person intending to commute for his assessment, or for any part thereof, shall, within twenty-four hours after he shall be notified to appear and work on the highways, pay the commutation money for the work required of him by such notice; and the commutation shall not be considered as complete until such money be paid. (*Id.* § 36.)

Corporations may commute.—Every moneyed or stock corporation may commute for the highway labor assessed upon it, in the same manner, and at the same rate as is allowed by law to individuals, or by paying such commutation to a commissioner of highways of the town; and the commutation money so paid may be expended by the commissioners of highways upon any district or districts in the town; and for that purpose the said commissioners shall be entitled to demand and receive from the overseers,

to whom any such commutation may have been paid, the whole or any portion thereof; but in every case where any such corporation shall be located in any city, village or town, where by law the road tax is now payable in money, the road tax imposed on any such corporation shall be paid in money, according to the provisions of the several laws affecting said city, village or town. (*Laws* 1837, *ch.* 431, § 3.)

3. TEAMS, ETC., SUBSTITUTES, HOURS TO WORK.

Every overseer of highways shall have power to require a team, or cart, wagon or plough, with a pair of horses or oxen, and a man to manage them, from any person having the same within his district, who shall have been assessed three days or more, and who shall not have commuted for his assessment; and the person furnishing the same upon such requisition shall be entitled to a credit of three days for each day's service therewith. (1 *R. S.* 509, § 37.)

Substitutes, hours to work.—Every person assessed to work on the highways, and warned to work, may appear in person, or by an able-bodied man, as a substitute; and the person or substitute so appearing shall actually work eight hours in each day, under the penalty of twelve and a half cents for every hour such person or substitute shall be in default, to be imposed as a fine on the person assessed. (1 *R. S.* 510, § 38.)

4. PENALTIES FOR NOT WORKING, AND HOW COLLECTED.

Penalty for neglect, etc.—If any such person or his substitute shall, after appearing, remain idle, or not work faithfully, or hinder others from working, such offender shall for every offence forfeit the sum of one dollar. (*Id.* § 39.)

Penalties for not working, etc.—Every person so assessed and duly notified, who shall not commute, and shall refuse or neglect to appear as above provided, shall forfeit for every day's refusal or neglect the sum of one dollar. If he was required to furnish a team, carriage, man or implements, and shall refuse or neglect to comply, he shall be fined as follows:

1. For wholly omitting to comply with such requisition, three dollars for each day.
2. For omitting to furnish a cart, wagon or plough, one dollar for each day.
3. For omitting to furnish a pair of horses or oxen, one dollar for each day.
4. For omitting to furnish a man to manage the team, one dollar for each day. (1 R. S. 510, § 40.)

Complaint, how made.—It shall be the duty of every overseer of highways, within six days after any person so assessed and notified shall be guilty of any refusal or neglect for which a penalty or fine is prescribed in this title, unless a satisfactory excuse shall be rendered to him for such refusal or neglect, to make complaint on oath to one of the justices of the peace of the town. (*Id.* § 41.) (See form No. 36.)

No one but an overseer can make complaint against one neglecting to work. The justice has no jurisdiction of a complaint by any other person. (*Walker v. Moseley*, 5 Denio, 102.) If the overseer should decide that an excuse offered was not satisfactory, and should enter a complaint even unreasonably, he will not be liable to the party complained of, unless he act maliciously. (*Potter v. Benniss*, 1 John. 515; *Freeman v. Cornwall*, 10 John. 470.) The complaint must be made to one of the justices of the town, and before a justice of the peace as justice, and not before a justice's court. (*Rice v. Milks*, 7 Barb.

837.) A justice is not disqualified to entertain these proceedings by reason of his being an inn-keeper. (*Id.*)

Proceedings thereon.—The justice to whom such complaint shall be made shall forthwith issue a summons, directed to any constable of the town, requiring him to summon such delinquent to appear forthwith before such justice, at some place to be specified in the summons, to show cause why he should not be fined according to law for such refusal or neglect; which summons shall be served personally, or by leaving a copy at his personal abode. (1 R. S. 510, § 42.) This summons should be served personally, if possible; and the service must be made by a constable of the same town. (See form No. 37.)

If, upon return of such summons, no sufficient cause shall be shown to the contrary, the justice shall impose such fine as is provided in this title for the offence complained of, and shall forthwith issue a warrant under his hand and seal, directed to any constable of the town where such delinquent shall reside, commanding him to levy such fine, with the costs of the proceedings, of the goods and chattels of such delinquent. (*Id.* § 43.) On return of the summons the justice should allow a reasonable time for the party to appear and defend; and when it is returned, served by copy, he should see that all has been fair in the attempt to serve it. No adjournment can be granted, but the justice can exercise a reasonable discretion in holding open the court for the appearance of the delinquent, or to allow him to procure witnesses. The justice has a large discretion in passing upon the sufficiency of the excuse. He is the sole judge, and his decision is final; no appeal or *certiorari* will lie from his decision. (See forms Nos. 38–40.)

The constable to whom such warrant shall be directed shall forthwith collect the moneys therein mentioned.

He shall pay the fine when collected to the justice who issued the warrant, who is hereby required to pay the same to the overseer who entered the complaint, to be by him expended in improving the roads and bridges in the district of which he is overseer. (1 R. S. 511, § 44.)

It is questionable whether any property is exempt from levy under this warrant. The exemption is "under any execution" in the justice's act, and the same words are used in reference to executions issued out of a court of record. (2 R. S. 367, § 22.) There has been no judicial exposition of the subject. It would seem, however, that the exemption does not apply.

Penalties to be set off.—Every penalty collected for a refusal or neglect to appear and work on the highways, shall be set off against the assessment upon which it was founded, estimating every dollar collected as a satisfaction for one day's work. (1 R. S. 511, § 45.)

Excuses.—The acceptance by an overseer of any excuse for refusal or neglect, shall not in any case exempt the person excused from commuting for, or working the whole number of days for which he shall have been assessed during the year. (1 R. S. 511, § 46.)

5. PROCEEDINGS TO COLLECT NON-RESIDENT LABOR UNPAID.

Every overseer of highways shall, on or before the first day of October in each year, make out and deliver to the supervisor of his town a list of all resident landholders residing in his district, who have not worked out their highway assessment or commuted for the same, with the number of days not worked or commuted for by each; at one dollar per day; and also a list of all the lands of non-residents, and of persons unknown, which were taxed on his lists, on which the labor assessed by the commie-

sioners has not been paid, and the amount of labor unpaid at one dollar per day; and the overseer, previous to delivering such lists, shall make and subscribe an affidavit thereon before some justice of the peace of the town, that he has given notice required by the thirty-second, thirty-third and thirty-fourth sections of this title (*ante* p. 137), and that the labor for which such land is returned has not been performed or commuted. (1 R. S. 511, § 47.) (See form No. 41.)

If any overseer shall refuse or neglect to deliver such lists to the supervisor, as provided in the last preceding section, or shall refuse or neglect to make the affidavit as therein directed, he shall, for every such offense, forfeit the sum of ten dollars, and also the amount of tax or taxes for labor remaining unpaid, at the rate of one dollar for each day assessed, to be recovered by the commissioners of highways and applied to making and improving the roads and bridges in said district. (*Id.* § 48.)

It shall be the duty of the supervisors of the several towns to receive the lists of the overseers of highways, when delivered pursuant to the preceding forty-seventh section, and to lay the same before the board of supervisors of the county. (*Id.* § 49.)

It shall be the duty of such board, at their next meeting, to cause the amount of such arrearages of labor, estimating a day's labor at one dollar for each day, to be levied on the lands of non-residents, so returned, and on the lands of residents as returned by the assessors of said town, and to be collected in the same manner that the contingent charges of the county are levied and collected, and to order the same, when collected, to be paid over to the commissioners of highways of the town, to be by them applied to the construction and improvement of the roads

and bridges in the district for whose benefit the labor was originally assessed. (*Id.* § 50.)

6. PENALTIES AGAINST CORPORATIONS, AND HOW COLLECTED.

Every moneyed or stock corporation shall be liable to the same penalties for every day's work required, and for every default of any substitute sent by them, as is provided by law in the case of individuals required to work on highways, which shall be collected in the same manner, and paid over to the commissioners of highways of the town, by the constable collecting the same, and may be expended by them in the same manner as herein provided for the commutation money received from any such corporation. The summons issued by any justice, according to this act, may be for any number of penalties incurred by any such corporation previous thereto, and may be served in the manner provided by law for the service of writs or summons issuing out of courts of record against corporations. (*Laws* 1837. *ch.* 431, § 4.) (See forms Nos. 36-40.)

In case any such penalty cannot be collected, as herein provided, the commissioners of highways of that town may file a bill in the Court of Chancery against any such delinquent corporation for the delivery and sequestration of its property; whereupon the same proceedings shall be had as are provided by law for the collection of county taxes assessed against incorporated companies; and the Chancellor shall possess the like powers in respect to the same; and the said commissioners may also recover such penalties or any number of them that may have been incurred, with costs, from such delinquent company in any court of record in this State. (*Id.* § 5.)

7. ANNUAL RETURN OF OVERSEER.

Every overseer of highways shall, on the second Tuesday next preceding the time of holding the annual town

meeting in his town, within the year for which he is elected or appointed, render to one of the commissioners of highways of the town an account in writing verified by his oath, and containing:

1. The names of all persons assessed to work on the highways in the district of which he is overseer.

2. The names of all those who have actually worked on the highways, with the number of days they have so worked.

3. The names of all those who have been fined, and the sums in which they have been fined.

4. The names of all those who have commuted, and the manner in which the moneys arising from fines and commutations have been expended by him.

5. A list of all persons whose names he has returned to the supervisor as having neglected or refused to work out their highway assessments, with the number of days and amount of tax so returned for each person, and a list of all lands which he has returned to the supervisor for non-payment of taxes, and the amount of tax on each tract of land so returned. (1 R. S. 512, § 51.) (See form No. .)

The oath to the above account may be administered before any commissioner of highways. (*Laws 1883, ch. 149.*)

To pay over moneys.—Every such overseer shall also then and there pay to the commissioner all moneys remaining in his hands unexpended, to be applied by the commissioners in making and improving roads and bridges in the town in such manner as they shall direct. (1 R. S. 512, § 52.)

Penalty, how collected.—If any overseer shall refuse or neglect to render such account, or, if having rendered the same, he shall refuse or neglect to pay any balance which may then be due from him, he shall, for every such offence,

forfeit the sum of ten dollars, to be recovered, together with any balance of moneys remaining in his hands, by the commissioners of highways, to be applied to making and improving the roads and bridges in said district; and it shall be the duty of said commissioners to prosecute for such penalty in every instance in which no return is made, or such delinquency occurs. (1 R. S. § 53.)

Re-assessment in case of neglect.—Whenever it shall appear from the annual return of any overseer of highways, made in pursuance of the fifty-first section of the sixteenth chapter of title first of the first part of the Revised Statutes, that any person who was assessed to work on the highways (other than non-residents) has neglected to work the whole number of days to him assessed, and has not commuted for, or otherwise satisfied such deficiency, then it shall be the duty of the commissioners of highways to reassess such deficiency to the person so delinquent, at the next assessment of work for highway purposes, and to add to it his annual assessment. (*Laws 1832, ch. 107, § 2.*)

Such reassessment shall not exonerate any overseer of highways from any penalty which he may have incurred under the sixteenth section of the last aforesaid chapter. (*Id.* § 3.)

8. RIGHTS AND LIABILITIES IN PERFORMANCE OF LABOR.

It is proper in this connection to ascertain the rights and liabilities of the highway officers in repairing and performing labor on highways. What rights have such officers in improving the road over the soil, and to the materials within the limits of the road? The general rule is that they may dig the soil and use the timber and other materials found within the space of the road in a reasonable manner for the purpose of making and repairing the road and its bridges.

There is, however, this exception, that all the trees standing or lying on any land over which a highway shall be laid out, shall be for the proper use of the owner or occupant of such land, except such of them as may be requisite to make or repair the highways or bridges on the *same* land. (1 R. S. 525, § 126.) This limitation restricts the use of trees by the public officers to the reparation of the roads and bridges on the same lands whereon such trees stand.

In the case of *Fish v. Mayor of Rochester*, (6 Paige, 272,) Chancellor WALWORTH said: "I believe it is the common practice of public officers having the care of public roads to take the materials which are removed from one part of the highway under their direction, in improving the road at that point, and deposit them wherever they may be wanted for the repair or improvement of the highway in other places; even beyond the boundaries of the lands opposite to where the materials were taken. The only restriction upon this power, of which I am aware, is that contained in the 126th section of the title of the Revised Statutes, relative to highways and bridges, which gives to the owner or occupant of lands over which a highway is laid out the use of the trees thereon, except such as are requisite to make or repair the highways or bridges on the same land. This legislative restriction of the right to use trees, or limiting it to repairs of the road within the same lands, appears to be founded upon the supposition that without such restriction they might be used to repair or improve other parts of the highway; and as the restriction is confined to trees, other materials may be used beyond the bounds of the land from which they are taken. Trees, when cut down, may be left, without much inconvenience, by the side of the highway until the owner of the land through which the road runs has a reasonable time to remove them. But when it is necessary to exca-

vate earth or gravel, it must be removed entirely, or the work cannot be completed, and must be done anew. And it cannot be deposited upon lands adjacent to the highway without the consent of the owners of such land."

The overseers have not the right to cut down the trees growing on the side of the road, and left there for shade or ornament. (*Ante p. 23.*) The owner of lands adjoining a highway not less than three rods wide, may plant or set out trees on the side of such highway contiguous to his lands, which trees shall be set in regular rows at a distance of at least six feet from each other; and whoever shall cut down, destroy or injure any tree that has been, or shall be, so planted or set out, shall be liable in damages to the owner of such adjoining lands. (1 *R. S.* 525, § 127.)

The powers of the highway officers are co-extensive with the territory included in the public way, and they may work and improve every part and parcel of it at pleasure, being only responsible for a wanton or malicious injury to the rights of the adjacent owners. It may very well be that in some places, and especially in thickly settled villages, the whole width of the street requires regulation and improvement, not only for the public convenience, but to avoid danger to teams of travellers on account of some irregular formation or roughness of surface. Indeed the whole breadth may be required, in the judgment of the commissioners, for the convenience of the public travel. (*Graves v. Otis*, 2 *Hill*, 470.) Therefore the highway officers were held to have power to cut down an eminence in a public street and sidewalk, whereby the plaintiff's store was left some six or eight feet above the level of the sidewalk adjacent to the premises. (*Id.*)

Commissioners and overseers of highways acting in the proper discharge of their duties, and without malice, may grade, level and improve streets and highways, and, if they

exercise proper skill, are not answerable for consequential damages which may be sustained by those who own lands bounded by the street or highway. And this is so whether the damage results either from cutting down or raising the street; and although the grade of the street has been before established, and the adjoining land owners have erected buildings with reference to such grade. (*Radcliff's Executors v. Mayor of Brooklyn*, 4 N. Y. R. 203, and cases.) They may, for the purpose of grading a highway, cut down a hill or raise an embankment in the road adjacent to the premises and dwellings of citizens, and if those citizens suffer expense and inconvenience thereby, no action can be maintained for the injury. (*Benedict v. Goit*, 3 Barb. 469; *Graves v. Otis*, *supra*.) But if the power be exercised in an unreasonable manner, or wantonly and maliciously, the rule is otherwise. (*Id.*)

In the case of *Radcliff's Executors v. Mayor of Brooklyn*, *supra*, it appeared that the plaintiff's testator was seized of a lot of land in Brooklyn, with a dwelling house, out houses and garden thereon, adjacent to the East river, but a considerable distance above it, which were sustained by a natural bank having a gradual descent to the river; that the defendants, acting in the capacity of commissioners of highways, in grading and leveling the street, dug away such natural bank, whereby the premises were undermined, and a part of the inclosed grounds, together with the shrubbery, fixtures, fences, etc., fell and were wholly lost, etc., it was held that no action could be sustained. So in *Fish v. The Mayor of Rochester*, (6 Paige, 268,) where the defendants, as commissioners of highways, were proceeding to level and grade the street in front of plaintiff's dwelling house and store, and to dig down and remove the earth therefrom, by which proceeding the plaintiff alleged his premises would be irreparably injured,

it was held that no action would lie, and an injunction was refused.

It has been decided in Maine that a surveyor—whose office is similar to that of overseer in this State—has no authority to appropriate land not lying within the limits of the road. That he has no authority to make a ditch through adjoining improved lands, for the purpose of having water turned off from the highway however important to the public it may be to have it done; and that for such an act the owner of the land may maintain trespass. (*Phummer v. Starlevant*, 32 Maine, 325.) Where the corporation of the city of New York, in whom are vested the powers and duties of commissioners of highways, in grading the public streets raised the same several inches without making any drain or sewer, thereby obstructing the former flow of water from the plaintiff's premises, so that the water ran from the street, and from the adjacent lots, upon such premises, and stood there for several months, the court held that no action could be maintained. BEARDSLEY, J., who delivered the opinion of the court, said: "The corporation of New York had an undoubted power to raise, pitch, grade and make the street and avenue, as was done in this instance; and it was conceded on the trial of the cause that the proceedings for these purposes had been regular. What was done it was therefore lawful to do; and if the plaintiff was thereby incommoded, it was *damnum absque injuria*, and gave her no right of action against those who had only exercised a legal power vested in them for the public convenience and welfare. It would, indeed, be remarkable if such an act would, in any case, subject a party to an action; and I think the law is not chargable with so gross an absurdity. The plaintiff does not allege that any part of her land was taken for the street or avenue; but one portion of her complaint is that she was injured by making the street

and avenue on land which bounded two sides of her lot. She certainly may thus have sustained some damage, for more or less inconvenience results to individuals in every case of this description. It is so in the opening of new highways, and in the construction of canals and other public works; but if those on whom powers for such purposes are conferred do not exceed their jurisdiction, they are not responsible for collateral consequences to individuals. As was said by Lord KENYON in a case which, in principle, is like the point now under consideration: 'If this action could be maintained, every turnpike act, paving act and navigation act would give rise to an infinity of actions. If the legislature think it necessary, as they do in many cases, they enable the commissioners to award satisfaction to the individuals who happen to suffer. But if there be no such power the parties are without remedy, provided the commissioners do not exceed their jurisdiction. But it does not seem to me that these commissioners, acting under this act, have been guilty of any excess of jurisdiction. Some individuals suffer an inconvenience under all these acts of Parliament; but the interest of individuals must give way to the accommodation of the public.' (*Governor, &c., of Cast Plate Manufacturers v. Meredith*, 4 Durn. & East. 796.) In the same case BULLER, J., observed: 'There are many cases in which individuals sustain an injury for which the law gives no action; for instance, pulling down houses, or raising bulwarks, for the preservation and defence of the kingdom against the king's enemies. The civil law writers indeed say that the individuals who suffer have a right to resort to the public for satisfaction; but no one ever thought that the common law gave an action against the individuals who pulled down the houses, &c. This is one of those cases to which the maxim applies, *salus populi suprema est lex*. If the thing complained of were lawful

at the time, no action can be sustained against the party doing the act. In this case express power was given to the commissioners to raise the pavement; and not having exceeded their power, they are not liable to an action for having done it.' (See also *Sutton v. Clarke*, 6 Taunt. 29; *Hall v. Smith*, 2 Bing. 156.) So, this corporation having power to make the street and avenue along the plaintiff's land, and not having transcended its authority in what was done, is not liable to an action at the suit of the plaintiff for any damage she may have sustained." (*Wilson v. Mayor of New York*, 1 Denio, 597.)

But it is clear, from the authorities cited above, that if the highway officers are actuated by malice or ill-will in making alterations in the highway by which another is injured, they are liable. So municipal corporations are liable for any carelessness or unskillfulness in repairing or altering a highway whereby injuries are sustained.

Thus, where trustees of an incorporated village undertook to construct a platform to connect a sidewalk with a bridge, and while the work was in progress, carelessly left an uncovered space therein during the night, without placing any guard or signal to warn passengers of such opening, the corporation was held liable to one who had fallen through such opening and sustained injuries thereby. (*Weet v. Trustees of Brockport*, 16 N. Y. R. 161.)

So where a corporation caused a culvert to be constructed to carry off the water of a natural stream, and a freshet having occurred, the culvert, in consequence of its want of capacity and the unskillfulness of its construction, failed to discharge the waters, so that they were set back upon the factory of the plaintiffs and injured their property situated therein; it was held that the corporation was liable for the damage. (*Rochester White Lead Co. v. Rochester*, 3 N. Y. R. 463.) See further as to the liability

of commissioners, towns and incorporated cities and villages, *ante page 73, et seq.*

Where the road crosses a natural stream, a bridge or culvert is to be constructed so as not to obstruct the current. So, if a highway is laid out along a watercourse, comprehending it in whole or in part within the limits of the highway, and it becomes necessary to work the road to its entire width, it must be done by constructing a roadway over the channel, so as not to obstruct the flow of the water. (*People v. Kingman*, 24 N. Y. R. 559.)

CHAPTER VIII.

LAYING OUT HIGHWAYS.

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| <ol style="list-style-type: none"> 1. Commissioners to lay out. 2. Application. 3. Survey. 4. Order to be posted. 5. Consent of owner, when necessary. 6. Oath of freeholders, when necessary. 7. How laid out across railroad tracks. 8. Between different towns or counties. 9. Width of roads. | <ol style="list-style-type: none"> 10. Roads along division lines. 11. Removal of fences. 12. To be opened and worked within six years. 13. What roads are public highways. 14. When turnpike roads become highways. 15. Special commissioners to lay out roads. 16. Papers, when and where filed. |
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1. COMMISSIONERS TO LAY OUT.

A highway can be created only by laying it out and recording it under the laws of this State, or by a public use for twenty years or more. Working a private way as a highway does not make it such. (*Miller v. Garlock*, 8 Barb. 153.)

The commissioners of highways have power, in the manner and under the restrictions hereinafter provided, to lay out, on actual survey, such new roads in their respective towns as they may deem necessary and proper; and to discontinue such old roads and highways as shall appear to them, on the oaths of twelve freeholders of the same town, to have become unnecessary. (1 R. S. 502, § 2.) In laying out a highway the commissioners exercise a special and limited jurisdiction, and although it may be presumed, until the contrary appear, that they have acted legally, their acts may be impeached by showing that they have exceeded their powers. If they have no jurisdiction, as where they lay out a road through a yard or building, without the owner's consent, their order is void, and is not

helped by an affirmance on appeal. (*Ex parte Clapper*, 3 *Hill*, 458.)

Two commissioners may act.—Any two commissioners of highways of a town may make the order laying out a highway, provided it shall appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the subject embraced in the order, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon. (1 *R. S.* 525, § 125.) An order laying out a highway through improved, inclosed or cultivated lands, signed by only two of the commissioners, and not reciting that the third participated in the proceedings, or was notified to do so, is void. (*People v. Hynds*, 30 *N. Y. R.* 470; *Stewart v. Wallis*, 30 *Barb.* 344.) The order must be sufficient on its face. Its defects cannot be helped out or supplied by parol. (*Id.*) Where the third commissioner did not participate in the proceedings, the order must show that he was duly notified to attend the meeting *for the purpose of deliberating on the subject of laying out the road*. A simple allegation that he had been *duly notified to attend* is insufficient. (*Fitch v. Commissioners of Kirkland*, 22 *Wend.* 132.)

2. APPLICATION.

Every person liable to be assessed for highway labor may apply to the commissioners of highways of the town in which he shall reside, to alter or discontinue any road, or to lay out any new road. Every such application shall be in writing, addressed to the commissioners, and signed by the person applying. (1 *R. S.* 513, § 54.) So every person liable to be assessed for highway labor, and owning lands in a town in which he is not a resident, may apply to the commissioners of highways of the town in

which the lands are situated to alter, discontinue, or to lay out any road through the same. (*Lawes* 1836, *ch.* 122.)

The word "same" in this act refers to the town and not to the lands of non-residents; so that a non-resident owning lands in a town, and assessed for highway labor, is placed on equal ground with residents as to application. (*People v. Eggleston*, 13 *How.* 123.) (For form of application, see Appendix No. 42.)

It is no objection to proceedings for laying out a highway that they are taken on the application of a person not liable to assessment for highway labor. The commissioners may even proceed to lay out a road on their own motion; and without application by any person. (*Marble v. Whitney*, 28 *N. Y. R.* 297; *People v. Supervisors of Richmond*, 20 *N. Y. R.* 252; *Gould v. Glass*, 19 *Barb.* 179; see *contra Harrington v. People*, 6 *Barb.* 611.)

Notice of application.—Where the application is for a road through inclosed, improved or cultivated land, notices in writing must be posted up at three of the most public places of the town, specifying, as near as may be, the route of the proposed highway, the several tracts of land through which the same is proposed to be laid, and the time and place at which the freeholders will meet to examine the ground. Such notices are to be posted up at least six days before the time specified for the meeting of the freeholders. (1 *R. S.* 514, § 59.) In laying out such road the commissioners are not limited to the route specified in the application, but may, in the exercise of a sound discretion, make such variations as they think proper. The departure, however, from the route of the proposed highway must not be so great as to induce the belief that the preliminary proceedings have been wholly disregarded; the general course of the road must be pre-

served. (*Hallock v. Woolsey*, 23 Wend. 328.) (For form of application and notice, see Appendix Nos. 42, 43.)

3. SURVEY.

Whenever the commissioners of highways shall lay out, alter or discontinue any road, either upon application to them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order, to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same. (1 R. S. 513, § 55.) (For form of survey and order, see Appendix No. 44.)

It is a sufficient survey to run a single line which will be intended as the centre of the road, unless something appears on the record of the commissioners to show that such was not their intention, and a specification of the quantity of land which the road will take from each proprietor over whose ground it passes, will ascertain its width. (*People v. Commissioners of Redhook*, 13 Wend. 310; *People v. Commissioners of Salem*, 1 Cow. 23.) The fact that but two of the commissioners of highways were present when a proposed road was surveyed and signed, the survey is not of itself a fatal objection to the validity of their acts. In the absence of evidence to the contrary, it will be presumed that the third commissioner met and consulted with them in reference to their proceedings, at or before the time the paper was signed. (*Tucker v. Rankin*, 15 Barb. 471. The survey is a mere ministerial act, not requiring the presence of the third commissioner to give validity to an order laying out and establishing the highway. (*Marble v. Whitney*, 28 N. Y. R. 297.)

The clerk, in recording the survey, acts as a ministerial officer, and he cannot refuse to record it because of some supposed omission or mistake in the name of one of the commissioners, or because the commissioners had not taken

the oath of office and filed a certificate of the oath. The clerk may be compelled, by mandamus, to record the survey. (*People v. Collins*, 7 John. 549.)

4. ORDER TO BE POSTED.

It shall be the duty of the town clerk, whenever any order of the commissioners for laying out, altering or discontinuing a road shall be received by him, to post a copy of such order on the door of the house where the town meeting is usually held; and the time hereinafter limited for appealing from any such order shall be computed from the time of recording the same. (1 R. S. 513, § 56.) (See form of order, Appendix No. 44.)

5. CONSENT OF OWNER, WHEN NECESSARY.

No public or private road shall be laid out through any orchard or garden without the consent of the owner thereof, if such orchard be of the growth of four years or more, or if such garden have been cultivated for four years or more before the laying out of such road. Nor shall any such road be laid out through any buildings or any fixtures or erections for the purpose of trade or manufactures, or any yards or inclosures necessary to the use and enjoyment thereof, without the consent of the owner. (1 R. S. 514, § 57.)

The restrictions on the powers of the commissioners apply only to cases where the owner withholds his consent. The commissioners may lay out a road through any kind of property with the consent of the owner. (*Lansing v. Caswell*, 4 Paige, 523.)

Consent.—The oral consent of the owner to the laying out of a highway through his orchard, garden, fixtures, etc., is valid, provided it be acted upon immediately by

the commissioners, and the road laid out before any revocation of such consent. But such consent is revocable, and is revoked by a sale and conveyance of the land in good faith before the road is laid out. (*People v. Goodwin*, 5 N. Y. R. 568.) Although such consent may be revoked, it must be done before the road is laid out. If the commissioners have acted on the faith of the verbal consent, by laying out the road, the owner will be estopped from denying the legality of the act. (*Marble v. Whitney*, 28 N. Y. R. 297. Where such consent has been given under a mistake of law merely, no relief can be given, even on a bill in equity, filed for that purpose. (*Id.*))

And consent may be inferred from the acts and conduct of the owner. Thus, if he appear before the referees on appeal and litigate the question of damages, his consent may possibly be presumed. (*Lansing v. Cannell*, 4 Paige, 523.) (For form of consent, see Appendix No. 45.)

Orchard.—In no event can commissioners of highways lay out a road through an orchard of four years' growth without the consent of the owner.* But this restriction does not prevent them from laying out a road through an enclosed field because there are fruit trees in any part of it, however distant they may be from the highway. It does not follow that a whole field is an orchard because there are fruit trees in some part of it. But the road can not be laid out in such a manner as to deprive the owner, either in whole or in part, of the beneficial enjoyment of his fruit trees. (*People v. Judges of Dutchess*, 23 Wend. 360.) In the latter case there were two apple trees standing in the lane where a road had been laid out, which trees had formerly belonged to the orchard, but had been

*Roads may be laid out through orchards in Westchester and Putnam counties. (*Lawe* 1834, ch. 390.)

separated from it by a fence for several years. They stood in an open lane contiguous to the public highway; they had not been trimmed, and no care had been taken of them for a long time; and one of the trees was dead and the other nearly so, and in the opinion of witnesses, would never bear fruit again. The lane in which the trees stood had long been a common passage way from the public road to a saw mill, and was used at pleasure by the customers of the mill owner, with the consent of the proprietor of the land, the court held that the *locus in quo* was not an orchard within the meaning of the statute. So it seems the commissioners have no right to deprive an owner of the benefit of his fruit trees, in an orchard of the growth of four years or over, by an order for the opening of an old road to the width of two rods. (*Snyder v. Pless*, 28 N. Y. R. 478.)

If a highway is laid out through an orchard of four years growth, without the consent of the owner, the commissioners of highways, and their agents, will be trespassers if they enter upon the premises to open and work such highway. (*Harrington v. The People*, 6 Barb. 612.)

Garden.—To prevent the laying out of a highway through a plat of land, on the ground that it is a garden, it must appear that such land has been cultivated as a garden for four years or more before the laying out of such highway. What constitutes a garden is a question of fact. The general definition is, a piece of ground appropriated to the cultivation of herbs or plants, fruits and flowers.

Building.—Though the commissioners are not authorized to lay out a road through any building without the owner's consent, yet the erection or removal of a building upon the proposed line of a road, after an application therefor, for

the purpose of defeating such application, cannot have that effect, but the road may be laid through it. (*Carris v. Commissioners of Waterloo*, 2 Hill, 443.) If the commissioners exceed their jurisdiction by laying out a road through a building, without the owner's consent, the order is void, and is not helped by the affirmance of the judges on appeal. (*Ex parte Clapper*, 3 Hill, 458.)

Fixtures or erections.—Only such fixtures or erections are exempt as are for the purposes of trade or manufacture. Over other fixtures and erections a road may be laid out by the oaths of freeholders, unless such fixtures and erections amount to buildings. The tenter bars of a fulling mill are within the prohibition. (*Clark v. Phelps*, 4 Cow. 190.) So the incline plane of a railroad, with its ropes and fixtures, are fixtures and erections for the purpose of trade within the statute. (*Mohawk, &c. R. R. v. Archer*, 6 Paige, §3.)

A ditch or canal, by which water is conducted to a mill, is not a building, fixture or erection within the meaning of the statute. (*People v. Kingman*, 24 N. Y. R. 559.) The term "erection" implies some structure super-imposed upon the land; and means something which a highway may be laid through, and which would be rendered useless by the act. (*Id.*)

What are or are not fixtures and erections, within the above statute, is a question of fact, to be determined in each case in reference to the situation and nature of the property.

Yard or enclosure.—It is not every yard or enclosure which is appurtenant or contiguous to a building, or fixture, or erection for the purpose of trade or manufactures, through which the commissioners are prohibited from laying out a road or highway. It is only such yards or

enclosures as are necessary to the use and enjoyment of such building, fixture or erection. This clause must be constructed with reference to the situation and nature of the property to which the yard or enclosure is appurtenant. (*Lansing v. Caswell*, 4 Paige, 528.) In the country, where there is an abundance of vacant land which may be appropriated for the purpose of making roads, and where the public would be equally well accommodated by the laying out of the road through such lands, it would be highly improper for the commissioners of highways to attempt to lay out a road through a court yard or enclosure attached to a dwelling house or manufactory, although such yard or enclosure was not absolutely necessary to its use or enjoyment. But in the case of urban property, where vacant ground for the location of streets is not so easily obtained, and where a particular location is frequently a matter of importance to that part of the community for whose accommodation the street or highway is principally intended, the restriction is more limited. (*Id.*) It is not necessary that the yard should be protected by fences, but it must be defined in some way, either by an enclosure, by visible marks, or by a definite occupation within certain exterior lines. (*People v. Kingman*, 24 N. Y. R. 562.) Thus, where there was unoccupied land adjacent to a saw mill, and belonging to the mill owner, a portion of which was used to deposit logs, and to pile lumber, it was held that the commissioners could lay out a road through such land, but were bound to leave land enough, between the road and the mill, out of which the owner could form a mill-yard. (*Id.*) The extent of the area to be thus left is not a question affecting their jurisdiction, but is a matter which the law has committed to their official discretion. It is possible that a clear abuse of their authority might subject them to an action on the case at the suit of the party injured; but, so far as the

public is concerned, the highway thus laid out is a legal highway, and it is the duty of the commissioners to proceed to open it. (*Id.*)

The term "yard or enclosure" applies as well to the court yard contiguous to a building or dwelling as to lands adjacent to trade fixtures and erections. (*Clark v. Phelps*, 4 Cow. 190; *Lansing v. Caswell*, 4 Paige, 519.) And where the commissioners had laid out a road through the door-yard of a person, leaving his well, cow-shed, and part of his corn-crib in the street, it was held that the proceeding was void on the ground of excess of jurisdiction. (*Ex parte Clapper*, 3 Hill, 458.)

A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine house, &c., necessary for its use at a station. (*Albany Northern R. Co. v. Brownell*, 24 N. Y. R. 345.)

A highway may be laid along a ditch or canal by which water is conducted to a mill, and it may comprehend such ditch or canal, in whole or in part, within the limits of the road; but if it is necessary to work the road to its entire width, it must be done by so constructing a bridge or roadway over the channel as not to obstruct the flow of water. (*People v. Kingman*, 24 N. Y. R. 559.)

The commissioners, in laying out a highway, exercise a special and limited jurisdiction, and although it may be presumed, until the contrary appear, that they have acted legally, it is quite clear that their acts may be impeached by showing that they exceeded their power. (*Ex parte Clapper*, 3 Hill, 458.)

6. OATH OF FREEHOLDERS, WHEN NECESSARY.

No highway shall be laid out through enclosed, improved or cultivated land without the consent of the owner or occupant thereof, unless certified to be necessary by the oath of twelve reputable freeholders of the town, in the

manner hereinafter provided. (1 R. S. 514, § 58.) (For form of certificate, see Appendix No. 46.)

The commissioners have no jurisdiction to lay out a road through enclosed, improved or cultivated lands, without either the consent of the owner or occupant, or unless certified to be necessary by the oath of twelve reputable freeholders. When speaking of improved land it is generally understood to be such as has been reclaimed and is used for the purposes of husbandry, whether appropriated to tillage, to meadow or to pasture. Although the above section uses the words "owner or occupant," it can hardly be supposed that where the land is occupied by a tenant, his consent would be sufficient. In such case the consent of both owner and occupant should be obtained. The consent need not be in writing. (*Noyes v. Chapin*, 6 Wend. 461; *People v. Albright*, 14 Abb. 305; 23 How. 306.)

Freeholders' certificate.—The statute by freeholders, means such as have the legal title to real estate—such as are freeholders without a proceeding in court to make or declare them so; a legal title to land is requisite. (*People v. Hynds*, 30 N. Y. R. 472.) It will be presumed by the court, that the freeholders who certify to the necessity of the road were reputable freeholders. (*Clark v. Phelps*, 4 Cow. 190.) If there be not a certificate by twelve freeholders, the subsequent proceeding will be void, as where one omits to sign the certificate, or is not a freeholder. (*Town of Gallatin v. Loucks*, 21 Barb. 578; *People v. Commissioners of Seward*, 27 Barb. 94; *People v. Hynds*, *supra*.) A recital in the order laying out a road, that twelve freeholders have certified as to its necessity, is not conclusive evidence of the fact. That being a jurisdictional fact, is open to contradiction. (*People v. Commissioners of Seward*, *supra*.)

The freeholders that make the certificate, are not to be

interested in the lands through which the road is to be laid, nor of kin to the owner thereof. (1 R. S. 514, § 60.) But if the certificate is made by more than twelve freeholders, some of whom are disqualified by reason of kinship or interest, the proceedings will be valid, provided twelve of the number are competent, as when the certificate is signed by twenty, and five are of kin to the owner. (*Commissioners of Carmel v. Judges of Putnam*, 7 Wend. 264.) The term "kin" includes all related within the ninth degree. (*People v. Cline*, 23 Barb. 197.) A person holding a legal title in a purely fiduciary capacity—as one of the trustees of a religious society—is not an owner within the provision excluding those of kin to the owner from certifying as freeholders. (*Id.*) (For form of certificate, see Appendix No. 46.)

Notice of application.—Every person who shall apply for the laying out of the highway through any such land, shall cause notices in writing to be posted up at three of the most public places of the town, specifying as near as may be the route of the proposed highway, the several tracts of land through which the same is proposed to be laid, and the time and place at which the freeholders will meet to examine the ground. Every such notice shall be posted up at least six days before the time specified therein for the meeting of the freeholders. (1 R. S. 514, § 59.)

It is not necessary for the applicant to specify courses and distances. That is the business of the commissioners, if they conclude to lay out the road. The application will be sufficient if it give the *termini* and general route of the proposed road. (*People v. Judges of Dutchess*, 23 Wend. 360; *Hallock v. Woolsey*, 23 Wend. 328.) (For form of notice, see Appendix No. 43.)

Proceedings thereon.—If twelve reputable freeholders of the town, not interested in the lands through which

the road is to be laid out, nor of kin to the owner thereof, shall appear at the time and place specified in the notice, they shall then be sworn by a justice of the peace, or any officer authorized to administer oaths, well and truly to examine and certify in regard to the necessity and propriety of the highway applied for. (1 R. S. 514, § 60.)

The commissioners have no authority to act until twelve freeholders certify to the necessity of the road. If there are not that number of qualified freeholders, all subsequent proceedings will be void. (*Commissioners of Carmel v. Judges of Putnam*, 7 Wend. 264; *People v. Hynds*, 30 N. Y. R. 472.) See the remarks above, as to the character and qualifications of the freeholders.

To examine route.—They shall then personally examine the route of such highway, and shall hear any reason that may be offered for or against laying out the same. If they shall be of opinion that such highway is necessary and proper, they shall make and subscribe a certificate in writing to that effect, which shall be delivered to the commissioners of highways of the town. (1 R. S. 514, § 61.) (For form of certificate, see Appendix No. 46.)

The freeholders act upon the notice of the applicant and general description of the route therein, and have no authority to locate it with greater particularity. They determine whether such highway is necessary and proper, leaving the particular route to the decision of those whose business it is to lay out the road. (*Hallock v. Woolsey*, 23 Wend. 328; *People v. Judges of Dutchess*, 23 Wend. 363.) This certificate should be filed in the town clerk's office. It is a public document, open for inspection by all the inhabitants of the town in which the road is laid out; and, if it come into the hands of a stranger, not a commissioner of highways, the court will compel him by attachment to file it with the town clerk. (*People v. Vail*, 2 Cow. 623.)

Jurors not to be paid.—No compensation shall be allowed any juror for examining and certifying in regard to the necessity and propriety of any highway being laid out, altered or discontinued, nor for appearing to make such examination. (*Laws 1845, ch. 180, § 14.*)

Notice to occupants.—Before the commissioners shall determine to lay out the highway so applied for and certified, they shall cause notices in writing to be given to the occupant of the land through which the road is to run, of the time and place at which they will meet to decide on the application. The notice shall be served by delivering the same to such occupant, or if he be absent, by leaving the same at his dwelling house; and, in either case, at least three days before the time of meeting. (1 R. S. 514, § 62.) (For form of notice, see Appendix No. 47.)

The commissioners may refuse the application to lay out the road, even after the jury have certified to its propriety. The notice is to be served on the *occupant* of the land. An occupant may have very little interest in the premises. It is his duty, however, if a tenant, to notify his landlord. Without such notice, the commissioners have no authority to proceed, and the fact that the occupant was present and sworn as a witness, will not be deemed a waiver of notice. (*People v. Osborn, 20 Wend. 186.*)

Description of road.—The commissioners shall meet at the time specified in the notice, and shall hear any reasons that may be offered for or against laying out the highway. If they shall determine to lay out such highway, they shall make out and subscribe a certificate of such determination, describing the road so laid out, particularly, by routes and bounds, and by its courses and distance, and shall deposit the same with the town clerk. (1 R. S. 514, § 63.) (For form of certificate, see Appendix No. 44.)

The determination of the commissioners must be confined to the highway applied for, but they are not limited to the precise *route* specified in the application; they may, in the exercise of a sound discretion, make such variations as they may think proper. The departure, however, from the proposed route must not be so great as to induce the belief that the preliminary proceedings have been wholly disregarded; the general course of the road must be preserved. (*Hallock v. Woolsey*, 23 Wend. 328; *Woolsey v. Tompkins*, 23 Wend. 324.)

The certificate of the commissioners required by the above section will be sufficiently conformable to the statute, if in the description of the road a *single* line is given with the courses and distances. (*Id.*) Since the statute prescribes the width, an order laying out a road is sufficiently explicit if it specifies the central line. (*Lawton v. Commissioners of Cambridge*, 2 Caines 179; *People v. Commissioners of Salem*, 1 Cow. 23.) If a single line is run, it must be intended to be the centre of the road, unless something appears from the record to show that such was not the intention of the commissioners. (*People v. Commissioners of Redhook*, 13 Wend. 310.) When a single line is run, and a specification given of the quantity of land which the road will take from each proprietor over whose grounds it passes, the width may be ascertained by a simple calculation. (*Id.*) It is also held, that the certificate of the commissioners will be sufficient if it state the termini (that is the beginning and end) of the road, and its route by courses and distances; it is not necessary that it state the bounds of each course. (*Woolsey v. Tompkins*, 23 Wend. 324.) It is advisable, however, that all the bounds and width, as well as the courses, be particularly stated, to avoid uncertainty and controversy. (See Appendix No. 44.)

7. HOW LAID OUT ACROSS RAILROAD TRACKS.

It shall be lawful for the authorities of any city, village or town in this State, who are by law empowered to lay out streets and highways, to lay out any street or highway across the track of any railroad now laid, or which may hereafter be laid, without compensation to the corporation owning such railroad; but no such street or highway shall be actually opened for use until thirty days after notice of such laying out has been served personally upon the president, vice-president, treasurer or a director of such corporation. (*Laws 1853, ch. 62, § 1.*) (See form No. 48.)

A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine house, &c., necessary for its use at a station. (*Albany Northern Railroad Company v. Brownell, 24 N. Y. R. 345.*) The above statute does not violate the constitutional provisions against taking private property for public use, or impairing the obligation of contracts. (*Id.*)

Railroad corporations to take road across their tracks.—It shall be the duty of any railroad corporation across whose track a street or highway shall be laid out as aforesaid, immediately after the service of said notice, to cause the said street or highway to be taken across their track, as shall be most convenient and useful for public travel, and to cause all necessary embankments, excavations and other work to be done on their road for that purpose; and all the provisions of the act passed April second, eighteen hundred and fifty, in relation to crossing streets and highways, already laid out, by railroads, and in relation to cattle guards, and other securities and facilities for crossing such roads, shall apply to streets and highways hereafter laid out. (*Laws 1853, ch. 62, § 2.*)

Penalty for neglect or refusal.—If any railroad corporation shall neglect or refuse, for thirty days after the

service of the notice aforesaid, to cause the necessary work to be done and completed, and improvements made on such streets or highways across their road, they shall forfeit and pay the sum of twenty dollars for every subsequent day's neglect or refusal, to be recovered by the officers laying out such street or highway, to be expended on the same; but the time for doing said work may be extended, not to exceed thirty days, by the county judge of the county in which such street or highway, or any part thereof, may be situated, if in his opinion the said work cannot be performed within the time limited by this act. (*Id.* § 3.)

8. BETWEEN DIFFERENT TOWNS OR COUNTIES.

Disagreement respecting certain roads.—When the commissioners of highways of any town shall disagree with the commissioners of any other town in the same county, relating to the laying out of a new road, or the alteration of an old road, extending into both towns; or when the commissioners of a town in one county shall disagree with the commissioners of a town in another county, relative to laying out a new road, or altering an old road, which shall extend into both counties, the commissioners of both towns shall meet together at the request of either disagreeing commissioners, and make their determination upon such subject of disagreement. (1 R. S. 516, § 72.)

Road upon line of two towns.—Whenever it shall become necessary to have a highway upon the line between two towns, such highway shall be laid out by two or more of the commissioners of highways of each of said towns, either upon such line, or as near thereto as the convenience of the ground will admit, and they may so vary the same either to the one or to the other side of such line, as they may think proper. (1 R. S. 516, § 73.)

How divided into districts.—It shall be the duty of the same commissioners, when they lay out such highway, to divide it into two or more road districts, in such manner that the labor and expense of opening, working and keeping in repair such highway, through each of the said districts, may be equal as near as may be, and to allot an equal number of the said districts to each of the said towns. (1 R. S. 516, § 74.)

Effect of allotment.—Each district shall be considered as wholly belonging to the town to which it shall be allotted, for the purpose of opening and improving the road, and for keeping it in repair; and the commissioner shall cause such highway, and the partition and allotment thereof, to be recorded in the office of the town clerk in each of their respective towns. (1 R. S. 517, § 75.)

Where an encroachment has occurred upon a highway running on the line between two towns, the commissioners of both towns cannot unite as plaintiffs, and bring an action to recover the penalty or forfeiture. (*Bradley v. Blair*, 17 Barb. 480.)

Former roads.—All highways heretofore laid out upon the line between any two towns, shall be divided, allotted, recorded and kept in repair in the manner above directed. (1 R. S. 517, § 76.)

9. WIDTH OF ROADS.

All public roads to be laid by the commissioners of highways of any town, shall not be less than three rods wide, and all private roads shall not be more than three rods wide. (1 R. S. 517, § 80.)

This applies only to roads laid out by the commissioners. Where roads are claimed from a user of twenty years, they may be more or less than three rods wide;

the width will depend on the actual *user*. (*Harlow v. Huniston*, 6 Cow. 189.)

But it is the duty of the commissioners to order the overseers of highways to open all roads to the width of two rods at least, which they shall judge to have been used as public highways for twenty years. (1 R. S. 521, § 101.)

The jury, which is called to determine the disputed question of an encroachment, have no power to determine the question of the width and boundaries of a highway, according to the previous dedication or use, which has been neither laid out nor ascertained and described by the commissioners of highways. That duty belongs exclusively to the commissioners, and is to be performed by them in an entirely different manner. (*Talmage v. Hunting*, 29 N. Y. R. 447.)

Where a road is ordered by the commissioners to be laid out for a part of the distance, *three* rods in width, and for the residue of the distance, which is on the bed or track of an old road used for more than twenty years, *two* rods in width, the proceedings are not vitiated and rendered void by the provision in the order, allowing a road to be opened which is only two rods wide. Regarding the first part of the order, laying out the road up to the point of intersection with the old road, as one in perfect accordance with the powers of the commissioners, and the residue, which follows the old road, as a description of the old road to be recorded, and for the purpose of having it opened two rods in width by a subsequent order to that effect; the whole is consistent and harmonious, and entirely within the power of the commissioners. (*Snyder v. Plass*, 28 N. Y. R. 465.)

Where roads are laid out under the statute, they will be deemed to be at least three rods wide, and a person will be liable for an obstruction within that width.

10. ROADS ALONG DIVISION LINES.

Whenever a public or private road shall be laid along the division line, between the lands of two or more persons, and wholly upon one side of said line, and the lands upon both sides of said division line shall be cultivated or improved; then, and in that case, the person owning or occupying the lands joining said road, shall be paid for building and maintaining such additional fence, as he may be required to build or maintain, by reason of the laying out and opening said road; which said damages shall be ascertained and determined in the same manner that other damages are now ascertained and determined in the laying highways on private roads. (*Laws 1853, ch. 174, § 16.*)

11. REMOVAL OF FENCES.

Whenever the commissioners of highways shall have laid out any public highway, through any inclosed, cultivated or improved lands, in conformity to the provisions of this title, and their determination shall not have been appealed from, they shall give the owner or occupant of the land through which such road shall have been laid, sixty days' notice in writing to remove his fences. If such owner shall not remove his fences within the sixty days, the commissioners shall cause such fences to be removed, and shall direct the road to be opened and worked. (1 *R. S.* 520, § 96.)

If the determination of the commissioners shall have been appealed from, then the sixty days' notice shall be given after the decision of the judges upon such appeal shall have been filed in the office of the town clerk of the town. (1 *R. S.* 520, § 97.)

Sixty days' notice must be given before proceeding to open the road, as well where it has been established by an alteration made by judges after the same has been laid out

by them on appeal, as when a road is originally laid out by commissioners. Actual notice must be shown, as it will not be presumed. (*Case v. Thompson*, 6 Wend. 634.)

Though a road has been laid out, the owner is entitled to sixty days' notice to remove his fences, and the overseer has no right to abate or remove them without such notice. (*Kelley v. Horton*, 2 Cow. 424.) (For form of notice, see Appendix No. 49.)

12. TO BE OPENED AND WORKED WITHIN SIX YEARS.

Every public highway and private road already laid out, and dedicated to the use of the public, that shall not have been opened and worked within six years from the time of its being so laid out, and every such highway hereafter to be laid out, that shall not be opened and worked within the like period, shall cease to be a road for any purpose whatever; but the period during which any suit, mandamus, certiorari or other proceeding shall have been, or shall be pending, in regard to any such highway, shall form no part of said six years, and all highways that have ceased to be traveled or used as highways for six years, shall cease to be a highway for any purpose. (1 R. S. 520, § 99, as amended 1861, ch. 311.)

The provisions of this act apply to every public highway and private road laid out and dedicated to the use of the public within the last six years, and to every such highway hereafter to be laid out. (*Laws* 1861, ch. 311, § 2.)

The limitation of the second section prevents the application of that law to a case where a road has been a public highway by user up to 1844, when it was shut up for a period of over six years, when it was again opened, and has since been used by the public down to the time of the trial in 1865. (*Amsbey v. Hinds*, 46 Barb. 622.)

The commissioners have six years in which to cause the roads they have laid out to be opened and worked, but if

it be not done within that period, their order laying out the road has no legal effect. The road must be both opened and worked. It is not necessary that every part of it should be worked. The statute does not prescribe how well or how much it shall be worked. (*Marble v. Whitney*, 28 N. Y. R. 297; *Walker v. Caywood*, 81 N. Y. R. 51.) Where after the making of an order by the commissioners of highways in 1839, for laying out a road, the road was that year opened in fact, and during 1839 and succeeding years, was opened and partially worked throughout the routes, and was traveled by the public more or less every year from the time of its being laid out, opened and worked, it was held that this was an opening and working of the road within six years, as contemplated by the statute. (*Marble v. Whitney, supra.*)

The statute applies only to those cases where there has been a failure to open and work the road at all, and not where the highway has been in full use for the whole time, though not in all places open to its full width. The failure, by the commissioners, to cause a highway, long in use, to be opened to its full statute width for a period of thirty years, does not operate to extinguish the rights of the public to the parcel not so opened and worked. (*Walker v. Caywood, supra.*) If the road has been properly laid out and recorded, though not opened to its full width for over six years, the commissioner may proceed to so open it, and may remove the fences thereon—and the fact that the road has been used at a less width than laid out for over twenty years, will not prevent a removal of the fences. (*Id.*)

13. WHAT ROADS ARE PUBLIC HIGHWAYS.

All public highways now in use heretofore laid out, and allowed by any law of this State, of which a record shall

have been made in the office of the clerk of the county or town, and all roads not recorded which have been or shall have been used as public highways for twenty years or more, shall be deemed public highways, but may be altered in conformity to the provisions of this title. (1 R. S. 521, § 100.)

This but enacts what the common law has already declared, that roads which have been used as public highways for twenty years, though not recorded, shall be deemed public highways. (*People v. Judges of Courtland*, 24 Wend. 491. (See *ante* p. 46, *et seq.*) It is the duty of the commissioners to cause such roads to be ascertained, described and entered of record in the town clerk's office. (See farther on the subject, *ante* p. 69.)

A way which has been neither laid out and entered of record as required by law, nor used as public highway for twenty years, is not a highway.

14. WHEN TURNPIKE ROADS TO BECOME HIGHWAYS.

Whenever any turnpike corporation shall become dissolved or the road discontinued, its road shall become a public highway, and be subject to all the legal provisions regulating highways. (*Laws* 1838, *ch.* 262, § 1.)

15. SPECIAL COMMISSIONERS TO LAY OUT ROADS.

It was provided by an act to enlarge the powers of boards of supervisors, (*Laws* 1838, *ch.* 314, § 1, *sub.* 4), that the supervisors of each county have power, at their annual meeting, or when lawfully convened at any other meeting, to appoint special commissioners to lay out public highways in those cases where they shall be satisfied that the road applied for is important, and that the authority now conferred by law upon commissioners of highways cannot or will not be exercised to accomplish the laying out of such road.

But such power shall not be exercised by any board of supervisors unless the applicant therefor shall prove to such board of supervisors the service of a notice, in writing, on a commissioner of highways of each town through and into which any such highway is intended to be laid, at least six days previous to presenting such application, specifying therein the object thereof, and names of persons proposed to be appointed such commissioners. (*Laws 1848, ch. 164.*)

The supervisors shall have power to provide for the payment of the special commissioners appointed under the above provision, for their time and expenses.

The decisions made by said commissioners may be appealed from and reviewed in the same manner, and with the like authority, as is allowed by law in the cases of roads laid out by the commissioners of highways of any town.

The roads so to be laid out by such special commissioners, or the same as settled on appeal, shall be recorded, opened and worked as public highways of the towns in which they are respectively situated, in the same manner as other highways of the town are now required by law to be recorded, opened and worked. (*Laws 1838, ch. 314, § 4.*)

16. PAPERS, WHEN AND WHERE FILED.

All applications, certificates, and other papers relating to the laying out, altering or discontinuing of any road shall be filed by the commissioners of highways, as soon as they shall have decided thereon, in the office of the town clerk of the town. (1 *R. S.* 518, § 83.)

For the law relating to appeals from the determination of the commissioners laying out or refusing to lay out a road, and for that relating to the assessment of damages for laying out a road, see hereafter.

CHAPTER IX.

ALTERING AND DISCONTINUING HIGHWAYS.

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| 1. Altering highways. | 4. Description of road abandoned. |
| 2. Discontinuing highway. | 5. Effect of discontinuance. |
| 3. Discontinuance by non-user. | |

1. ALTERING HIGHWAYS.

As we have already seen, the commissioners of highways have power, and it is their duty, to alter such highways as they, or a majority of them, shall deem inconvenient. (*Ante p. 68.*) This power to alter is given for the purpose of making the road better by changing its site, and should only be exercised when the road is deemed inconvenient. They may restore the boundaries and fences of a highway to its original lines; and if it passes by or through an inconvenient place, they may change its location; but if, in so doing, it becomes necessary to take more or other lands of the adjoining proprietor, compensation therefor must be made the same as on the original location. (See *People v. Judges of Courtland*, 24 *Wend.* 493.) (See form of order, Appendix No. 50.)

Application.—The commissioners may alter a road without any application (*Gould v. Glass*, 19 *Barb.* 179), or upon the application of any person living in the town, liable to be assessed for highway labor (1 *R. S.* 513, § 54), or upon the application of any person liable to be assessed for highway labor, and owning lands in a town

in which he is not a resident. (*Laws* 1836, *ch.* 122; *People v. Eggleston*, 13 *How.* 123.) Where application is made, it must be in writing, addressed to the commissioners, and signed by the person applying. (*Id.*) (See form No. 51.)

Without jury.—The commissioners have power to alter a public highway without the intervention of a jury. It is only in case of laying out a new road through improved lands, or the discontinuing of an old one, that the examination and certificate of a jury is necessary. (*Garretson v. Clark, Lator*, 162.)

Survey.—Whenever the commissioners shall alter any road, either upon application or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same. (1 *R. S.* 513, § 55.) As to the manner in which the survey is to be made, see *ante*, chap. VIII.

Order to be posted.—It is the duty of the town clerk whenever any order of the commissioners for altering a road shall be received by him, to post a copy of such order on the door of the house, where the town meeting is usually held; and the time hereafter limited for appealing from such order, shall be computed from the time of recording the same. (1. *R S.* 513, § 56.)

When two commissioners may act.—Any two commissioners may make the order altering a highway, provided it shall appear in the order filed by them, that all the commissioners of highways of the town met and deliberated on the subject embraced in such order, or were duly

notified to attend a meeting of the commissioners for the purpose of deliberating thereon. (1 R. S. 525, § 125.)

The order must be sufficient on its face. Its defects cannot be helped out or supplied by parol. (*People v. Hynds*, 30 N. Y. R. 473.) Where the third commissioner does not participate in the proceeding, the order must show that he was duly notified to attend for the purpose of deliberating on the subject embraced in the order. A simple allegation that he *has been duly notified to attend* is insufficient. (*Fitch v. Commissioners of Kirkland*, 22 Wend. 132.) If the order is signed by only two of the commissioners, and does not recite the fact that the third participated in the proceedings, nor that he was notified to do so, it is void. (*People v. Hynds*, *supra*; see also *ante* p. 84.)

Disagreement respecting certain roads.—When the commissioners of highways of any town shall disagree with the commissioners of any other town in the same county, relating to the alteration of an old road extending into both towns; or when the commissioners of a town in one county, shall disagree with the commissioners of a town in another county, relative to altering an old road which shall extend into both counties, the commissioners of both towns shall meet together at the request of either disagreeing commissioners, and make their determination upon such subject of disagreement. (1 R. S. 516, § 72.)

Papers where filed.—All applications, certificates and other papers relating to altering any road, shall be filed by the commissioners of highways, as soon as they shall have decided thereon, in the office of the town clerk of the town. (1 R. S. 518, § 83.)

Damages and appeals.—Damages arising from the alteration of a road, are to be assessed in the same manner

ALTERING AND DISCONTINUING HIGHWAYS. 183

as on laying out a road. Appeals from the order of the commissioners altering, or refusing to alter a road, are also to be taken in the same manner as in case of laying out a road. For the law and practice on those subjects, see the succeeding chapters.

2. DISCONTINUING HIGHWAY.

The commissioners of highways have power to discontinue such old roads and highways as shall appear to them, on the oaths of twelve freeholders of the same town, to to have become unnecessary. (1 R. S. 502, § 2.)

Application.—They may proceed to discontinue a road of their own motion, and without any application therefor. (*Gould v. Glass*, 19 Barb. 179; *Marble v. Whitney*, 28 N. Y. R. 297.) Or they may proceed on the application of any person living in the town, liable to be assessed for highway labor (1 R. S. 513, § 54); or of any person liable to be assessed for highway labor and owning lands in the town, although he be a resident of another town. (*Laws* 1836, ch. 122.) Every such application shall be in writing, addressed to the commissioners and signed by the person applying. (*Id.*)

The application to lay out a new road, and to discontinue an old one, may be in one form. (*People v. Robertson*, 17 How. 74.) (See form No. 52.)

Two commissioners may act.—Any two commissioners of the town may make the order discontinuing an old road, provided it appear in the order filed by them that all the commissioners of highways of the town met and deliberated on the subject embraced in the order, or were duly notified to attend a meeting of the commissioners for the purpose of deliberating thereon. (1 R. S. 525, § 125.) The order must be sufficient on its face. Its defects cannot be

helped out or supplied by parol. If it is signed by only two, and does not show that all were present and participated in the proceedings, or were notified to attend a meeting of the commissioners for the purpose of deliberating on the subject of the order, the order will be void. (*People v. Hynds*, 30 N. Y. R. 470; *Fitch v. Commissioners of Kirkland*, 22 Wend. 135.) (See further hereon *ante* chap. VIII.)

To summon jury.—Whenever application shall be made for the discontinuance of an old road, on the ground that it has become useless and unnecessary, the commissioners of highways to whom such application shall be made, shall summon twelve disinterested freeholders of the town to meet on a day certain to consider such application. Such freeholders, when met, shall be sworn well and truly to examine and certify in regard to the propriety of such discontinuance. (1 R. S. 517, § 81.)

The statute does not require the commissioners to issue or to have any process—it only requires them to summon the freeholders. The fact that the freeholders have assembled under void process does not disqualify them for acting when they are afterwards legally requested so to do. (See *People v. Commissioners of Greenbush*, 24 Wend. 367.) It seems that the commissioners must themselves summon the jury, instead of calling in the aid of some officer who usually performs such services. (*Id.*)

Twelve freeholders.—The statute by freeholders means such persons as have the *legal* title to real estate—such as are freeholders without a proceeding in court to make or declare them so; a legal title to lands is requisite. (*People v. Hynds*, 30 N. Y. R. 472.) The commissioners have no authority to act until twelve freeholders certify that the road is useless and unnecessary. If there are not

that number of qualified freeholders, all subsequent proceedings will be void. (*Id. Town of Galatin v. Loucks*, 21 Barb. 578.) A recital in the order discontinuing a road that twelve freeholders have certified that it is useless and unnecessary is not conclusive evidence of the fact. That is a jurisdictional fact and is open to contradiction. (See *People v. Commissioners of Seward*, 27 Barb. 94.) (See further as to the qualification, etc., of the freeholders, *ante* chap. VIII, sub. 6.)

Jury to be sworn.—The jury are to be sworn well and truly to examine and certify in regard to the propriety of such discontinuance. Such oath may be administered by one of the commissioners. (*Law 1845, chap. 180.*)

Proceeding of jury.—They shall then proceed to view such road, and if they shall be of opinion that the same is useless and unnecessary, they shall make and subscribe a certificate in writing to that effect, which shall be delivered to the commissioners of highways, who shall thereupon proceed to decide upon such application. (1 R. S. 518, § 82.) (See form No. 53.)

• The commissioners have no power in any case to discontinue a road without the oath of the freeholders. After the freeholders have made the certificate, the commissioners may grant or refuse the application. An appeal may be had from their decision.

Jury not to be paid.—No compensation shall be allowed any juror for examining and certifying in regard to the propriety of any highway being discontinued, nor for appearing to make such examination. (*Laws 1845, ch. 180, § 14.*)

Survey.—Whenever the commissioners of highways shall discontinue any road, either upon application to

them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them, and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same. (1 R. S. 573, § 55.)

In recording such survey and order, the town clerk acts ministerially, and cannot refuse to do it on the ground of some defect in the order, nor on the ground that the commissioners have neglected to take the oath of office and file the certificate of such oath. (*People v. Collins*, 7 John, 549.) The clerk may be compelled by mandamus to record the order. The survey is to be made in the same manner as in laying out highways, as to which, see *ante* chap. VIII.

Order to be posted.—It is the duty of the town clerk whenever an order discontinuing a road shall be received by him, to post a copy of such order on the door of the house where the town meeting is usually held; and the time limited for appealing from any such order, shall be computed from the time of recording the same. (1 R. S. 513, § 56.)

What roads may be discontinued.—The power of commissioners to discontinue roads, is limited to roads which have, since they were laid out, become, or proved upon trial to be useless and unnecessary. It does not enable them, or a jury of freeholders called by them, to reverse decisions laying out roads, especially where such decisions have been affirmed on appeal. (*People v. Pike*, 18 How. 70.) So a formal discontinuance of a road as a highway, which was never in fact a public highway, is a nullity. (*Miller v. Garlock*, 8 Barb. 153.)

Papers when and where filed.—All applications, certificates and other papers relating to the discontinuing of

any road, shall be filed by the commissioners as soon as they shall have decided thereon, in the office of the town clerk of the town. (1 R. S. 518, § 83.)

3. DISCONTINUANCE BY NON-USER.

It is provided, among other things, by chapter 311 of the laws of 1861, amending section 99 of the Highway Law, that all highways that have ceased to be traveled or used as highways for six years, shall cease to be a highway for any purpose. By the second section of the same act, it is provided that the provisions of this act shall apply to every public highway laid out and dedicated to the use of the public, within the last six years, and to every such highway hereafter to be laid out. The limitation of the second section prevents the application of that law to a case where a road has been a public highway by user up to 1844, when it was shut up for a period of six years, when it was again opened and had since been used by the public down to the time of trial in 1865. (*Amsbey v. Hinds*, 46 Barb. 622.)

Independent of the above provision, the Revised Statutes establish no rule or law for the discontinuance by non-user of a highway, once established.

The only means by which such discontinuance could be affected are by non-user for a period of twenty years, or by such an entire and absolute abandonment as could leave, under the circumstances, no question of intent. (*Id.* per BOARDMAN J.) An abandonment can only be predicated upon the acts of those entitled to the easement. The public alone can work an abandonment by obstruction. One individual can not do it; least of all the person from whom the easement is due. (*Id.* *Corning v. Gould*, 16 Wend. 531.)

4. DESCRIPTION OF ROAD ABANDONED.

Whenever any public highway or any part thereof, by reason of alterations made therein, or by the opening of a new road, or in other way, shall be abandoned by the public, and is no longer used as a public road, the commissioners or commissioner of highways, shall file in the town clerk's office of the town, a description in writing signed by them or him, of the road so abandoned, and the same shall thereupon be discontinued. (*Laws of 1853, ch. 174, § 15.*) (See form No. 54.)

5. EFFECT OF DISCONTINUANCE.

Whenever a highway is discontinued or abandoned, the entire and exclusive enjoyment of the land over which such way was located, reverts to the owner of the soil. (*Jackson v. Hathaway, 15 John, 453.*) So on the discontinuance of an old road in the city of New York, the fee is not in the corporation, but presumptively in the owners of the adjoining lands. (*Van Amringe v. Barnett, 8 Bow. 357.*)

But where the adjoining land is owned by one person and the fee of the highway by another, on discontinuing the highway, the soil does not pass to the adjacent owner but reverts to the owner of the fee. As where the owner of lands adjoining a highway sells them, and bounds the grants *on the sides* of the highway, or by other equivalent expressions, the fee of the highway does not pass, and on its discontinuance, the soil reverts to the grantor. (*Jackson v. Hathaway, supra.*)

When any person shall be the owner of any land over which any highway shall run, and such highway shall be discontinued in whole or in part, by reason of some other road to be established and laid out through the lands of the same person, the persons who shall assess the damages

shall take into calculation the value of the road so discontinued, and the benefit resulting to such person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying such new road ; and thereupon the owner of the land may inclose so much of the highway so discontinued as shall belong to him. (1 R. S. 516, § 71.)

Such deduction can be made only when such highway shall be discontinued in whole or in part, *by reason of some other road to be established and laid out through the lands of the same person.* Where an old road, the fee of which is in one person, is discontinued, and a new road laid out over the land of another person, which land is contiguous to the old road, the proprietor of the land is not entitled to the old road, as a compensation for the land taken for the new road. (*Jackson v. Hathaway, supra.*)

Appeals may be taken from the determination of commissioners discontinuing, or refusing to discontinue a highway. The practice on such appeal will be fully given hereafter.

CHAPTER X.

ASSESSMENT OF DAMAGES ON LAYING OUT ROAD.

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| <ol style="list-style-type: none"> 1. Compensation to be made. 2. By agreement. 3. Damages, how to be assessed. 4. Provision in case persons conceive themselves aggrieved. | <ol style="list-style-type: none"> 5. Costs of assessments, and by whom paid. 6. Damages assessed to be audited by supervisors. 7. Damages and expenses, how collected. 8. Cartiorari of proceedings. |
|---|---|

1. COMPENSATION TO BE MADE.

Although the legislature of the State, by virtue of the right of eminent domain, may take private property for public use—as for a highway—yet it must provide for making compensation for the property so taken. A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the law given to deprive an individual of his property without his consent. (2 *Kent.* 339.) The constitution of this State, as well as those of most of the other States, provides that private property shall not be taken for public use without just compensation.

When compensation to be made.—Although compensation must be made for the land taken, it appears not to be essential that such compensation, or offer of it, precede or be concurrent with the taking of the property. The statute provides that the damages shall be assessed before the road shall be opened, or worked or used. (1 *R. S.* 515, § 64.) But there is no provision that such damages shall be *paid* before such opening and use. The *appraisal* of damages is a condition precedent to the opening of the

road, but the *payment* of such damages is not. It has never been deemed necessary that the compensation which the constitution requires to be made for private property taken for public use, should be *actually* paid before entering upon or taking possession of the property. (*Bloodgood v. Mohawk and Hudson R. R. Co.* 14 Wend. 51, and cases cited; *S. C.* 18 Wend. 9; *Smith v. Helmer*, 7 Barb. 416.)

2. BY AGREEMENT.

The damages sustained by reason of the laying out and opening such road, may be ascertained by the agreement of the owner and the commissioners of highways, provided such damages do not exceed one hundred dollars, and unless such agreement be made, or the owner of the land shall in writing release all claim to damages, the same shall be assessed in the manner prescribed by law before such road shall be opened, or worked or used. Every such agreement or release shall be filed in the town clerk's office, and shall forever preclude such owner from all further claim for such damages. (1 R. S. 515, § 64.)

The agreement should be in writing, as it is required to be filed. The release must be in writing. No one but the owner of the land is entitled to damages. The occupant or tenant has no claim. If he is disturbed in his possession, he must look to his landlord for redress. This is, however, otherwise in the city of New York. There the damages of each person interested in the premises, as landlord and tenant, mortgagor and mortgagee, are to be estimated separately. (*Coutant v. Catlin*, 2 Sand. Ch. 485.) (See forms Nos. 55, 56.)

3. DAMAGES, HOW TO BE ASSESSED.

Whenever any damages are now allowed to be assessed by law when any road or highway shall be laid out,

altered or discontinued, in whole or in part, such damages, shall be assessed by not less than three commissioners, to be appointed by the county court of the county in which said road or highway shall be, on the application of the commissioner or commissioners of the town; and the commissioners so appointed shall take the oath of office prescribed by the Constitution, and shall proceed on receiving at least six days' notice of the time and place, to meet the highway commissioners and take a view of the premises, hear the parties and such witnesses as may be offered before them; and they shall all meet and act, and shall assess all damages which may be required to be assessed on the same highway, and shall be authorized to administer oaths to witnesses which may be produced before them under this section; and when they shall all have met and acted, the assessment agreed to by a majority of them shall be valid; and when so made shall be delivered to a commissioner of highways of the town, who, within ten days after receiving it, shall file it in the town clerk's office. (*Laws 1845, ch. 180, § 5, as amended 1847, ch. 455, § 2.*)

Application.—If the owner of land taken for a highway has right to damages, it is the duty of the commissioners of highways to apply to the county court for the appointment of commissioners to assess such damages. If they refuse to discharge that duty, they may be compelled to perform it by mandamus. (*Chapman v. Gates, 46 Barb. 319.*)

The application is to be made to the *court* and not to the *judge*. Notice of the application should be given to the land-owner interested. The commissioners appointed should be disinterested persons, not of kin to the owner of the land. (See form of application, Appendix No. 57.)

Notice of meeting.—Notice of the meeting of the commissioners, for the purpose of making the assessment, should also be given to the land owners in time for them to procure witnesses, etc. (See form No. 58.)

Commissioners to be sworn.—The commissioners must be sworn before proceeding to make the assessment. Taking the requisite oath is an act necessary to give them jurisdiction. The parties to the proceeding have no right to waive such an irregularity as an omission of the oath, since the whole town has an interest in the proceeding. (See *People v. Connor*, 46 Barb. 333.) (For form of oath, see Appendix No. 1.)

Proceedings on assessment.—The first thing that the commissioners are required to do, after taking the oath of office, is to view the premises. They are then to hear the parties and such witnesses as may be offered before them. It is said that they may take the opinion of others in whose integrity and judgment they have confidence, without swearing them as witnesses. They may converse with all classes of men concerning the business in hand, and collect information in all ways which a prudent man usually takes to satisfy his own mind concerning matters of the like kind, where his own interests are involved in the inquiry. The commissioners must exercise their own judgment at the last, but they may first seek light from other minds the better to enable themselves to arrive at just conclusions. Estimates from mechanics and builders may become important in the discharge of the duties of the commissioners, and in these and other cases they may require the sanction of an oath to the estimates which they receive. If, in any case, they make the opinions of others the basis of action, without exercising their own judgment, those

opinions should be given upon oath. But when they only seek information for the purpose of enlightening their own judgments, they may obtain it in any way in which men usually acquire knowledge. (In the matter of *William and Anthony streets*, 19 Wend. 695, per BRONSON, J.)

What damages to be allowed.—The value of the land taken is not restricted to its agricultural or productive qualities, but inquiry should be made as to all other legitimate purposes to which the property could be appropriated; and just compensation cannot be less than the damage which the owner of the property taken has sustained. (*Matter of Hamilton avenue*, 14 Barb. 415.) In making appraisals of this kind, the true rule, the only rule which will do equal justice to all parties, is to determine what will be the effect of the proposed change upon the market value of the property. The proper inquiry is, what is it now fairly worth in the market, and what will it be worth after the improvement is made? The question is not what estimate does the owner put upon it, but what is its real worth in the judgment of honest, competent and disinterested men? (*Matter of Furman street*, 17 Wend. 649, per BRONSON, J.; see also *Troy and Boston R. R. Co. v. Lee*, 13 Barb. 169.)

Contingent damages.—The commissioners cannot take into consideration any remote, contingent or speculative damages, yet they are not confined in making their appraisal to the actual value of the land to be taken, but may consider how the laying out and opening of the road will affect the residue of the owner's land. Will it leave that residue in an inconvenient and unmarketable shape? If so, that fact may properly be taken into account in determining the compensation. (See *Albany Northern R. R. Co. v. Lansing*, 16 Barb. 68.)

Although the language of the above section is broad enough to include consequential damages, they can only be allowed where some portion of the applicant's land has been taken for the highway. (*People v. Supervisors of Oneida*, 19 Wend. 102.)

Except where a highway is laid out along the line of a farm, taking no portion of the land of the owner, but subjecting him to the expense of maintaining the *whole* of the fence, the expense of *half* of which was formerly borne by him, such owner or person occupying such land shall be paid for building and maintaining such additional fence as he may be required to build or maintain, by reason of the laying out and opening such road. Such damages shall be ascertained and determined in the same manner that other damages are now ascertained and determined in laying out highways. (*Laws 1853, ch. 174, § 16.*)

Deductions for old road.—Where any person shall be the owner of any land over which any highway shall run, and such highway shall be discontinued in whole or in part, by reason of some other road to be established and laid out through the lands of the same person, the persons who shall assess the damages shall take into calculation the value of the road so discontinued and the benefit resulting to such person by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying out of such new road; and, thereupon, the owner of the land may inclose so much of the highway so discontinued as shall belong to him. (1 *R.S.* 516, § 71.)

The deduction, as above provided, is only to be made when the old road is discontinued *by reason of some other road* to be laid out through the lands of the *same* person.

Where the premises over which the highway is laid out have been already laid out or dedicated to the public as a

highway, the owner is not entitled to damages, notwithstanding that he is in possession of the premises, claiming adversely at the time the proceedings are commenced to open the road. (*Baldwin v. The City of Buffalo*, 35 N. Y. R. 375.)

Description of route.—In the assessment any description which designates the route of the road and shows that the assessment was for damages thereon, is sufficient; and in an action for the damages, after their collection by the officers, parol evidence to show that the route on which the assessment was made differed from that laid out by the appellate tribunal, is inadmissible. (*Hallock v. Woolsey*, 23 Wend. 328.)

Vested rights.—When the damages have been finally assessed, the owner's right to them is vested, and cannot be divested by statute, or by a discontinuance of the highway. When a highway is laid out the public acquire nothing more than an easement, and there is always a contingency by which the owner may return into full possession on its being no longer required by the public. When this contingent event will happen is ordinarily unknown, and is wholly immaterial as regards the rights of the landholder. Whether the public retains the use of the land for a century, or for a year, or but for a single day, cannot affect his title to compensation. That becomes fixed and vested the instant his property is taken for public use. (*People v. Supervisors of Westchester*, 4 Barb. 64.)

Repayment.—But where the proceedings for laying out the road were void from the beginning, the land owner to whom the damage assessed has been paid has no legal right to retain it, and those tax-payers from whom the money has been collected are entitled to have it restored

to them. The town, however, in its corporate capacity, has no connection with the transaction, and cannot maintain an action to recover back such money. (*Town of Gallatin v. Loucks*, 21 Barb. 578.) In this case one of the twelve freeholders sworn to examine and certify as to the necessity of the road having omitted to sign the certificate, neither the commissioners of highways, nor the county court, nor the referees who laid out the road acquired any jurisdiction in the case. The court held that the assessment of damages was unauthorized, and the tax levied upon the inhabitants of the town for the payment of those damages, was illegal; that those from whom the money had been collected were entitled to have it restored to them; and that the defendant, the land owner, had no legal right to retain it. It was further held that the town, in its corporate capacity, had no connection with the transaction, and could not maintain the action to recover back the money.

Award.—The commissioners are to make their award of damages in writing, and are to deliver it to the commissioners of highways, who within ten days after receiving it, are to file it in the town clerk's office. (See form of award, Appendix No. 59.)

Through uninclosed lands.—Where a highway shall hereafter be laid out through uninclosed, unimproved and uncultivated lands, the damages shall be assessed in the same manner as if the same were laid out through inclosed, improved and cultivated lands. (*Laws 1857, ch. 491, as amended 1858, ch. 51.*)

Vacancies, how filled.—If, for any cause, any commissioner or referee appointed under the above provision shall be prevented from serving, or shall refuse to serve,

the court or officer who appointed him shall have power to appoint another to supply his place. (*Laws* 1847, ch. 455, § 20.)

Orders to be filed.—All orders for the appointment of commissioners or referees, under the above provisions, shall be filed and recorded in the office of the town clerk of the town in which the road shall be located. (*Id.* § 21.)

Costs.—In all cases of the assessment of damages under the above provision, by the commissioners appointed by a county court, the costs thereof shall be paid by the town in which the damages shall be assessed, (*Laws* 1847, ch. 455, § 7,) and are to be audited by the board of supervisors, levied and collected in the same manner as the damages assessed. (See *Id.* § 23.)

4. PROVISION IN CASE PERSONS CONCEIVE THEMSELVES AGGRIEVED.

Any person conceiving himself aggrieved, or the commissioner or commissioners on the part of the town feeling dissatisfied with any such assessment, may, within twenty days after the filing thereof, as aforesaid, signify the same by notice in writing, and serving the same on the town clerk, and on the opposite party, that is, the persons for whom the assessments were made or the commissioner or commissioners of highways as the case may be, asking for a jury to *reassess* the damages, and specifying a time not less than ten nor more than twenty days from the time of filing said assessment, when such jury will be drawn at the clerk's office of an adjoining town of the same county, by the town clerk thereof, which notice shall be served upon said opposite party within three days after service upon the town clerk as aforesaid, and may be served personally, or by being left at the dwelling house of the party, with

some person in charge thereof, or if there be no such person, or the house be closed, then by fixing the same upon the outer door of said dwelling house. (*Laws* 1847, *ch.* 455, § 3.) (For form herein, see Appendix No. 60.)

The assessment of the commissioners is not annulled or invalidated by applying for a re-assessment. Nor is such assessment affected where the proceedings to re-assess are discontinued or the jury fail to agree. The award of the commissioners is in effect a judgment in favor of the owners of the land against the town; it is final and conclusive until reversed or vacated or a new judgment is rendered by the jury by whom the re-assessment is made. (*People v. Lewis*, 26 *How.* 378.)

Where no proceedings were taken for eleven months to call out a new jury, after the first failed to agree, it was held that the party applying for such re-assessment had abandoned the proceeding. (*Id.*)

Where two or more apply.—Where application shall be made by two or more persons for the re-assessment of damages by a jury, such jury shall be obtained in conformity with the terms of the notice first served upon the clerk of the town in which the damages are to be assessed. (*Laws* 1847, *ch.* 455, § 7.)

The above provision for re-assessing damages is decided not to be in conflict with the constitution. (*Clark v. Miller*, 42 *Barb.* 255.)

Proceedings.—Any person conceiving himself aggrieved may have such re-assessment whether he is in fact aggrieved or not. The notice and demand of a jury must be served on the town clerk within twenty days after the filing of the assessment of the commissioners. But the time of serving such notice is really less than twenty days, since such notice is to specify a time not less than ten nor more than *twenty*

days from the time of filing the assessment, for the drawing of the jury. The notice is to be served on the opposite party within three days after the service on the town clerk. The party asking such re-assessment should also give immediate notice to the town clerk of the town in which the jury is to be drawn, that such jury will be drawn, specifying the time. He must have at least three days' previous notice of such drawing. (See forms Nos. 60, 61.)

Jury, how drawn.—At the time and place mentioned in the preceding section, the town clerk of such adjoining town, having received three days' previous notice that such jury is to be drawn, from the person or party asking a re-assessment, shall deposit in a box the names of all such persons then residents of his town, whose names are on the last list filed in said town clerk's office of those selected and returned as jurors, pursuant to article second, title four, chapter seventh, part third of the Revised Statutes, who are not interested in the lands through which such road shall be located, nor of kin to either or any of the parties, and shall draw therefrom the names of twelve persons, and shall make a certificate of such names and the purposes for which they were drawn, and shall deliver the same to the party first asking for the re-assessment. (*Laws 1847, ch. 455, § 4.*) (See form No. 62.)

Jury, when to be summoned.—The party receiving such certificate shall, within twenty-four hours thereafter, deliver the same to a justice of the peace of the town wherein the damages are to be assessed; and it shall be the duty of such justice forthwith to issue a summons to one of the constables of this town, directing him to summon the persons named in such certificate, and shall specify a time and place in said summons at which the persons to be summoned shall meet, but no meeting of such persons shall

be had within twenty days from the time of filing the assessment of damages in the town clerk's office by the commissioner or commissioners of highways. (*Id.* § 5.) (For form of summons, see Appendix No. 63.)

The party applying for a jury and obtaining a certificate of the names of the persons drawn for that purpose, may select the justice of the proper town. Care should be taken to deliver such certificate to the justice within twenty-four hours from the time of its receipt.

Six jurors to be drawn.—Upon such persons appearing at the time and place mentioned in the summons, the justice who issued the summons shall draw by lot six of the persons attending to serve as a jury, and the first six persons drawn who shall be free from all legal exceptions, shall be the jury to re-assess all the damages required to be re-assessed upon the same highway; and the said jury shall be sworn by the said justice well and truly to determine and re-assess such damages as shall be submitted to their consideration, and shall take a view of the premises, hear the parties and such witnesses as may be offered by the parties, and sworn by such justice before them, and shall render their verdict in writing under their hands, which shall be certified by said justice and be delivered to the commissioners of highways of the town, and the same shall be final. (*Id.* § 6.) (For form of verdict and certificate, see Appendix No. 64.)

It is not essential to the validity of the proceedings that the same justice who issued the summons for the jury should certify their verdict. The statute in that respect is merely directory, and where the justice refuses or is unable to act, the verdict may be certified by another justice of the town. (*People v. Supervisors of Ulster*, 34 *N. Y. R.* 268, overruling same case, 32 *Barb.* 473.)

Notice of the time and place of empanelling the jury,

and of the subsequent proceedings, must be given to the opposite parties, and in the absence of such notice the whole proceedings will be set aside with costs. (*People v. Tallman*, 36 Barb. 222.)

In making the re-assessment, the jury are to proceed in the same manner as the commissioners on making the assessment. The manner in which such commissioners proceed is fully set forth in a former part of this chapter.

Where jury disagree.—In case the jury fail to agree on a re-assessment of such damages, after having been kept together for such time as the justice by whom they were impannelled shall deem reasonable, such justice may discharge them. A new jury may be summoned and impannelled, before whom the same proceeding shall be had for such re-assessment as might have been had before the first jury. (*People v. Lewis*, 26 How. 378.) The jury should not separate until they have agreed, or are discharged by the justice. Where the first jury cannot agree, it is the duty of the person applying to see that a new jury is summoned. If any of the jury drawn shall refuse, or be prevented from serving, the justice may draw others to fill the vacancy.

5. COSTS OF ASSESSMENTS, AND BY WHOM PAID.

In all cases of assessments of damages, under the provisions of this act, by commissioners appointed by a county court, the costs thereof shall be paid by the town in which the damages shall be assessed, and in cases of re-assessments of damages by a jury, on the application of the commissioners of highways of any town, and the first assessment shall be reduced thereby, the costs of such assessment shall be paid by the party claiming the damages, otherwise by the town; and in case a re-assessment of damages shall be had on the application of the

party for whom the damages were assessed, and such party shall fail to increase the same, he shall pay the costs thereof; but when such damages shall be increased by the jury, the costs shall be paid by the town; and when applications shall be made by two or more persons for the re-assessment of damages by a jury, such jury shall be obtained in conformity with the terms of the notice first served upon the clerk of the town in which the damages are to be assessed; and all persons who may be liable for costs under this section shall be liable in proportion to the amount of damages respectively assessed to them by the first assessment, and may be recovered in an action of assumpsit at the suit of any person or persons entitled to the same, before a justice of the peace. (*Laws 1847, ch. 455, § 7.*)

Allowance.—Town clerks shall be allowed the sum of fifty cents for drawing and certifying a jury, as provided by this act, and a constable for summoning such jury shall be allowed two dollars, except when the jury shall be taken from the same town wherein the road is located, in which case he shall be allowed only one dollar. And jurors who shall be summoned from an adjoining town, and shall attend, but not serve, shall be entitled each to fifty cents; and if they shall serve, then one dollar; if from the same town, and shall attend and not serve, twenty-five cents; if they shall serve, then fifty cents each. (*Laws 1847, ch. 455, § 19.*)

6. DAMAGES ASSESSED TO BE AUDITED BY SUPERVISORS.

All damages which may be finally assessed or agreed upon by commissioners of highways for the laying out of any road, except private roads, shall be laid before the board of supervisors by the supervisor of the town, to be audited with the charges of the commissioners, justices,

surveyors, or other persons or officers employed in making the assessment, and for whose services the town shall be liable, and the amount shall be levied and collected in the town in which the road is located, and the money so collected shall be paid to the commissioners of such town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges aforesaid. (*Laws* 1847, *ch.* 455, § 23.)

The award of damages by the commissioners or jury is conclusive on the board of supervisors, and cannot be revised by them; but they must cause it to be raised by tax. (*People v. Supervisors of St. Lawrence*, 5 *Cow.* 292.) Under the provisions of the Revised Statutes (1 *R. S.* 515, § 69), the board of supervisors might examine into the principles on which such assessment had been made, and increase or reduce the damages, but the act of 1847, above cited, gives them no such power.

Supervisors, how compelled to audit damages.—Should the board of supervisors refuse to audit the damages so assessed, they may be compelled to do so by mandamus. (*People v. Supervisors of Ulster*, 3 *Barb.* 336, and cases cited.)

7. DAMAGES AND EXPENSES, HOW COLLECTED.

The amount of damages, as finally settled, together with the charges of the commissioners of highways, justices, surveyors, and other persons or officers employed in making the assessment, shall be levied and collected in the town within which the highway shall be situated. The moneys so collected shall be paid to the commissioners of highways of the same town, who shall pay to the owner the sum assessed to him, and appropriate the residue to satisfy the charges. (1 *R. S.* 517, § 70, as modified by *ch.* 180 of 1845.)

8. CERTIORARI OF PROCEEDINGS.

If the proceedings for the assessment of damages by the commissioners appointed by the county court, or for the re-assessment of such damages by the jury, are in any respect irregular, a certiorari may be had for a review of the proceedings. (*People v. Tallman*, 36 Barb. 222; *People v. Lewis*, 26 How. 381.) If the proceedings to re-assess are reversed on certiorari, the original assessment of the commissioners stands subject to be annulled on re-assessment regularly made. (*People v. Lewis*, *supra*.)

CHAPTER XI.

APPEAL FROM THE COMMISSIONERS.

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| 1. Right of appeal—appointment of referees. | 6. Effect of appeal. |
| 2. Proceedings of the referees. | 7. Referees' fees. |
| 3. Powers and duties of referees. | 8. In what cases no appeal lies. |
| 4. Referees' decision and its effect. | 9. Certiorari of proceedings. |
| 5. Commissioners to carry out decision. | |

1. RIGHT OF APPEAL—APPOINTMENT OF REFEREES.

Any person who shall conceive himself aggrieved by any determination of the commissioners of highways, either in laying out, altering or discontinuing any road, or in refusing to lay out, alter or discontinue any road, may at any time within sixty days after such determination shall have been filed in the office of the town clerk, appeal to the county judge of the county in the same manner as appeals were heretofore allowed to be brought to three judges under title first, article fourth, chapter sixteenth, part first of the Revised Statutes; and when any appeal shall be brought under this section, the said judge, or in case of his residence in the town, or of his interest in the land through which the road shall be laid out, or in case he is of kin to any of the persons interested in said lands, or in case of his disability, for any cause, then one of the justices of the sessions shall, after the expiration of the said sixty days, appoint, in writing, three disinterested freeholders, who shall not have been named by the parties interested in the appeal, and who shall be residents of the county, but not of the town, wherein the road shall be located, as referees to hear and determine all the appeals that may have been

brought within the said sixty days, and shall notify them of their appointment and deliver to them all papers pertaining to the matters referred to them. Upon receiving notice of appointment the said referees shall possess all the powers and discharge all the duties heretofore possessed and discharged by the three judges, and give the same notices heretofore required to be given under title first, article four, chapter six, part one, aforesaid, and before proceeding to hear the appeal or appeals, they shall be sworn by some officer authorized to take affidavits to be read in courts of record, faithfully to hear and determine the matters referred to them. (*Laws 1847, ch. 455, § 8.*) (For forms herein, see Appendix Nos. 65–73.)

Who may appeal.—The right of appeal to the county judge from an order of the commissioners of highways laying out, altering or discontinuing, or refusing to lay out, alter or discontinue a highway, is given to every resident tax-payer of the town in which such road is located. It is not restricted to the applicants for the laying out, altering or discontinuing of such highway, nor to the owners of the land through which it runs. (*People v. Cortelyou, 36 Barb. 164.*)

According to the spirit and reasoning of this case the right of appeal is also given to every person liable to be assessed for highway labor and owning lands in a town in which he is not a resident; since every such person may apply to alter, discontinue or lay out a highway in the town where he owns the land. (See 1 *R. S.* 513, § 54, *as amended 1836, ch. 122.*)

Every person deeming himself aggrieved may appeal, and he is not concluded by a decision made on an appeal from the same order taken by another. (*Clark v. Phelps, 4 Cow. 190.*) It is not essential to the right of appeal that the person taking it should be in fact aggrieved; if he

conceives himself so it is sufficient. (*People v. Champion*, 16 *John*. 61.) A corporation owning lands on which a highway is laid out, is a "person" within the meaning of the statute giving the right of appeal. The design of the statute was to give the right to all persons or parties, whether natural or artificial, who should conceive themselves aggrieved. (*People v. May*, 27 *Barb*. 238.)

To what Judge.—The appeal is to the county judge of the county in which the road is situated. But in case such judge resides in the town where the road is situated, or is interested in the lands through which the road is laid out, or is of kin to any of the persons interested in said lands, or in case of his disability for any cause, he is not to appoint the referees, but they are to be appointed by one of the justices of sessions. It is an objection to the competency of the judge or justice of sessions to entertain the proceedings that such judge or justice was one of the twelve freeholders who certified to the necessity or propriety of laying out or discontinuing the road, but such objection may be waived. (*Commissioners of Carmel v. Judges of Putnam*, 7 *Wend*. 264.)

Time to appeal.—The appeal must be taken within sixty days after the order of the commissioners laying out, altering or discontinuing, or refusing to lay out, alter or discontinue a highway shall have been filed in the town clerk's office. By the fifty-sixth section of the Highway Law it is provided that the time for appealing shall be computed from the time of recording the order in the town clerk's office, but the same construction must undoubtedly be given to this provision as is given to that providing for the recording of deeds of real estate—that is, that they shall be deemed recorded from the time of their delivery to the clerk.

Form of appeal.—Every such appeal shall be in writing, addressed to the county judge of the county, and signed by the party appealing. It shall briefly state the ground upon which it is made, and whether it is brought to reverse entirely the determination of the commissioners, or only to reverse a part thereof; and in the latter case it shall specify what part. (1 *R. S.* 518, § 86, *as modified by Laws 1847, ch. 455, § 8.*) (See form No. 65.)

The grounds on which the appeal is made should be explicitly, though briefly stated. But a notice of appeal stating as a ground merely that the order of the commissioners is illegal, has been held to be good. (*Commissioners of Bushwick v. Meserole*, 10 *Wend.* 122.) So an appeal from the determination of commissioners refusing to lay out a road, in the following form: "I do hereby appeal from the determination of commissioners of highways in this matter to A, B & C, three judges of the court of common pleas in and for the county of Putnam. August 26, 1829." Signed etc., was decided to be a sufficient compliance with the above section. (*Commissioners of Carmel v. Judges of Putnam*, 7 *Wend.* 264.) Under the existing law this form would, of course, have to read: "To A. B., county judge of Putnam county." In other respects the section under which these decisions were made is the same now as it was at the time they were given.

It was formerly decided that the judges, on appeal, could only affirm or reverse the decision of the commissioners *in toto*, except in cases where roads were laid out without the intervention of freeholders; that they had no power, except in such cases to affirm in part and reverse in part, and that the statement in the appeal as to whether it was brought to reverse, *in whole or in part*, applied only to such exceptional case. (*Commissioners of Sherburne v. Judges of Chenango*, 25 *Wend.* 453.) But the act of 1847

(*Laws* 1847, ch. 455, § 9), extends the power of the referees on appeal to a partial reversal or modification of the order of the commissioners. (*People v. Commissioners of Cherry Valley*, 8 *N. Y. R.* 482; *People v. Baker*, 19 *Barb.* 240.) (For form of appeal, see Appendix No. 65.)

Notice to commissioners of appeal.—There is no provision made requiring notice of the appeal to be given to the commissioners until the referees are appointed and are ready to proceed. But it would be well to give the commissioners such notice that they may suspend all proceedings for opening the road. (See form No. 66.)

Appointment of referees.—At the expiration of sixty days after the order of the commissioners appealed from shall have been filed in the town clerk's office, the county judge, or in case he is a resident of the town, or is interested in the land through which the road shall be laid out, or is of kin to any of the persons interested in such land, or is otherwise disqualified, then one of the justices of sessions shall appoint, in writing, three referees, who are to hear and determine all the appeals brought within the sixty days. Such referees are to be three disinterested freeholders—residents of the county but not of the town wherein the road is located. They are not to be named by the parties interested in the appeal, and should not be of kin to any such parties, as in such case they would have no jurisdiction to hear the appeal, and their decision would be void. (*People v. Flake*, 14 *How.* 527.) Where several persons separately appeal, there should be but one set of referees, one hearing, and one order. (*Disosway v. Winant*, 34 *Barb.* 578.)

The referees are not to be appointed until after the expiration of the sixty days, that they may hear and determine all the appeals that are to be brought. But it

is probable that if they should be appointed within that time, and should proceed to hear the appeals, their proceeding and decision would not be void; but it would be an error which might be remedied by certiorari. (*Harrington v. People*, 6 Barb. 607.) Should the judge refuse or neglect to appoint the referees, he may be compelled to do so by mandamus. (For form of appointment, see Appendix No. 67.)

Order to be filed.—All orders for the appointment of the referees shall be filed and recorded in the office of the town clerk of the town in which the road shall be located. (*Laws 1847, ch. 455, § 21.*)

Notice to referees.—It is the duty of the judge making the appointment to notify the referees of their appointment, and to deliver to them all papers pertaining to the matter referred to them. If, from any cause, any of the referees appointed shall be prevented from serving, or shall refuse to serve, the judge who appointed him may appoint another to supply his place. (*Id.* § 20.) (See form of notice, Appendix No. 68.)

2. PROCEEDINGS OF THE REFEREES.

Notice.—It shall be the duty of the referees to proceed thereon as soon as may be convenient. Where the determination appealed from was against an application for laying out, altering or discontinuing a road, the referees shall give notice to the commissioners by whom such determination was made. When appeal is from a determination in favor of an application for laying out, altering or discontinuing a road, the notice shall be given to the commissioners and to one or more of the applicants for such road. In all cases, the notice shall specify the time and place at which the referees will convene to hear the

appeal. (1 R. S. 518, § 87, as modified by Laws 1847, ch. 455, § 8.) (For form of notice, see Appendix No. 70.)

Service of notice.—Every such notice shall be served at least eight days before the time mentioned therein, by delivering the same to one of the commissioners whose determination is appealed from, or by leaving the same at his dwelling house. If the notice be also directed to one of the applicants, it shall be served in the same manner. (1 R. S. 519, § 88.)

After the appointment of the referees on an appeal they become actors, and are bound to notify the parties to proceed; and their neglect cannot be imputed to the appellant as his laches. (*Clark v. Phelps*, 4 Cow. 190.)

They should, as early as possible, determine upon the time and place of meeting to hear and determine the appeals, and should prepare the notices of such meeting and cause them to be served as above provided. The notices must be in writing.

The referees have no jurisdiction to proceed on the appeal, until the notice of eight days of the time and place of meeting has been served in the manner above prescribed. (*People v. Judges of Herkimer*, 20 Wend. 186.) Notice should also be given to the parties bringing the appeal, although no special provision is made for such notice. Should the referees proceed to hear and determine the appeals without notice to the appellants, their proceedings may be reversed on certiorari. (See *People v. Tallman*, 36 Barb. 222.)

Although the notice need only be delivered to one of the commissioners, it is notice to all; and the one who receives it should give information to the other commissioners.

Notice to occupants.—A three days' notice in writing to the occupants of the land through which the road runs,

of the time and place of their meeting, is necessary, where the appeal is from an order of the commissioners refusing to lay out or alter a road. The eighth section of the act of 1847, above cited, declares that the referees "shall possess all the powers and discharge all the duties heretofore possessed and discharged by three judges." Among the powers and duties possessed and discharged by the three judges, it was provided that when an appeal had been made from a determination of the commissioners refusing to lay out or alter a road, and the judges shall reverse such determination, such judges shall lay out or alter the road applied for; and in doing so, shall proceed in the same manner in which the commissioners of highways are directed to proceed in like cases. (1 R. S. 519, § 91.) But before the commissioners of highways shall determine to lay out a highway, they are required to give three days' notice in writing to the occupant of the land through which the road is to run of the time and place at which they will meet to decide on the application. (1 R. S. 514, § 62.) The referees being required to proceed in the same manner as the commissioners, must give the same notice. (*Terpening v. Smith*, 46 Barb. 208; *People v. Judges of Herkimer*, 20 Wend. 186; *People v. Robertson*, 17 How. 74.) The fact that the occupant was present and sworn as a witness, is no waiver. (*People v. Judges of Herkimer*, *supra*.) And where the occupants of the land waive notice of the proceedings of the referees, but afterwards, and before any action was had on such waiver, withdraw it, the referees cannot proceed without giving the required notice. (*People v. Crozier*, 12 Abb. 445.) (For form of notice, see Appendix No. 71.)

Referees to meet.—The referees having given the requisite notices, it is their duty to convene at the time and place mentioned in the notice, and hear the proofs and allega-

tions of the parties. They shall have power to issue process to compel the attendance of witnesses, and may adjourn from time to time, as may be necessary. Their decision, or that of any two of them, shall be conclusive in the premises; and every such decision shall be reduced to writing, signed by the referees making it, and be filed by them in the office of the town clerk of the town who shall record the same. (1 R. S. 519, § 89.)

Referees to be sworn.—Before proceeding to hear the appeal, the referees shall be sworn by some officer authorized to take affidavits to be read in courts of record, faithfully to hear and determine the matters referred to them. (*Laws 1847, ch. 455, § 8.*) The taking of the oath prescribed is an act necessary to give the referees jurisdiction to proceed to hear and determine the appeal; and an omission to do so will render all their acts *coram non-judice* and void. Nor can the parties to the proceeding waive such an irregularity as the omission of the referees to be sworn. It is unlike proceedings between private parties, where they may waive any irregularity they choose. The whole town have an interest in the proceeding, and have a right to require that the proceedings shall, in all material respects, conform to the requirements of the statute. (*People v. Connor, 46 Barb. 333.*) It would be well to annex the affidavit to the decision, as it will then appear of record that the requirement of the statute has been complied with.

The oath may be taken before any judge of any court of record, any justice of the peace, commissioner of deeds, or clerk of any court of record. (2 R. S. 284, § 49. (For form of oath, see Appendix No. 69.)

To compel attendance of witnesses.—The referees have power to issue process to compel the attendance of wit-

nessess, and should do so at the request of either party. This process should be a subpoena directed to the witness, and requiring his attendance before them at the time and place therein mentioned. The signature of one of the referees to such subpoena would probably be sufficient, but where it is possible the signatures of all should be obtained. (For form of subpoena, see Appendix No. 72.)

May adjourn.—The referees may adjourn from time to time, as may be necessary. (1 R. S. 579, § 89.) There is no limit to the adjournment, so long as they are necessary, which is a matter of discretion with the referees. *People v. Ferris*, 41 Barb. 124.) After the hearing has been closed they may adjourn from time to time to enable them to make the decision. (*Id.*) But when once the decision has been made, and they have adjourned without day, their power and jurisdiction over the matter is spent, and they cannot afterwards proceed in the matter. (*Rogers v. Runyan*, 9 How. 248.)

3. POWERS AND DUTIES OF REFEREES.

The referees possess all the powers and are to discharge all the duties heretofore possessed and discharged by the three judges. (*Laws* 1847, ch. 455. § 8.) They have no authority to entertain an objection to the regularity of the proceedings anterior to the decision of the commissioners; their decision can only be on the merits, as to the necessity and propriety of laying out, altering, or discontinuing the road. If any irregularity has intervened previous to the decision of the commissioners, it can be corrected only by certiorari, directed to the commissioners. (*Commissioners of Warwick v. Judges of Orange*, 13 Wend. 432.) They are required to hear and decide the appeal on the facts existing at the time of the hearing before them, and not

on the facts existing at the time of the original application for the road. In this respect such hearing is in the nature of a new proceeding. (*People v. Goodwin*, 5 N. Y. R. 568.) They are like other inferior and subordinate officers and tribunals that are creatures of statute, to be confined to powers expressly conferred, or such as are necessarily incident to express powers. (*People v. Ferris*, 18 Abb. 64; 27 How. 193.)

It is the duty of the referees to proceed to hear proofs and allegations of the parties, and to make and file their decision in writing, affirming, reversing or modifying the order appealed from. They have no power to dismiss the appeal and refuse to proceed further on the ground that the order of the county judge was improvidently or irregularly granted, or that the appellant had no right to bring the appeal. But if they dismiss the appeal, the remedy of the party aggrieved is not by *certiorari* but by *mandamus* to compel them to proceed. (*People v. Cortelyou*, 36 Barb. 164.)

To decide on merits.—As has been before stated, the referees are to hear and decide the appeal, not on the facts existing at the time of the original application for the road, but on the facts existing at the time of the hearing before them. (*People v. Goodwin*, 5 N. Y. R. 568.) But in *People v. Cortelyou*, *supra*, it was intimated by the learned judge that the facts and proceedings necessary to give jurisdiction to the commissioners in making the order appealed from, was a subject for consideration by the referees on the appeal. And in the case of *The People v. Cline*, 23 Barb. 197,) it was said by STRONG, J.: "The statement in the determination or order of the commissioners, that twelve freeholders had met and decided that the proposed road and alterations were necessary and proper, was in effect an admission by them that such free-

holders were competent and unobjectionable. As, however, it involved the question of jurisdiction, it was not conclusive, and might be re-examined by the referees when the matter came before them." And *People v. Goodwin*, (5 N. Y. R. 568,) was cited as sustaining these views. But in *The Commissioners of Warwick v. Judges of Orange*, (13 Wend. 432,) it was decided that the judges had no authority to entertain an objection to the regularity of the proceedings anterior to the decision of the commissioners. And since the referees now possess all the powers, and are to discharge all the duties heretofore possessed and discharged by the three judges, this decision is as applicable now as it then was. In delivering the opinion of the court NELSON, J., said: "In the case of *Laaton v. The Commissioners of Highways of Cambridge*, (2 Caines, 179,) the opinion was expressed by Mr. Justice SPENCER, and, as I understand it, it was the opinion of the court, that the authority of the judges to hear the appeal was confined to the *merits* alone—the fitness or unfitness of laying out the road. No different opinion has been expressed in any subsequent case that has come under my notice. The proceeding by appeal was not intended to be a review of legal questions, or of irregularities that might exist in the preliminary steps, as on a writ of certiorari; but to be an examination of the necessity or propriety of the road, assuming all the previous steps to have been regularly taken. A certiorari directly to the commissioner is the appropriate remedy for the correction of errors committed by them. The decision of the judges is conclusive upon the parties in the premises. (1 R. S. 519, § 89.) It is obvious if they had jurisdiction to confirm or reverse the decision of the commissioners for mere error of law, their judgment would be final, which could not have been intended by the Legislature; nor has such been the exposition of their powers by this court, and

had it been, it would be the only answer necessary to be given to the numerous points of law raised in this case. The judges can only entertain, examine and decide the appeal on its merits, and then their decision is final and conclusive, so far as the merits are involved. * * * * Upon the whole, therefore, I perceive no solid reasons against the position laid down in the case of *Lawton v. Commissioners of Highways of Cambridge*, that the authority of the judges to hear the appeal is confined to the merits alone; on the contrary, much inconsistency and violation of sound principles is avoided, and the spirit of the statute faithfully executed, by confining them to that question. The power of this court can be legitimately exerted to keep both the commissioners and the judges within their proper bounds in conducting their proceedings, and then the determination first by one, and then by the other on appeal, will be conclusive in the premises, according to the letter of the statute. Upon any other view, a road might be laid out, upon a reversal of the determination of the commissioners, on mere legal questions, without involving their opinion upon the merits. The act contemplates such an opinion before the judges can act." So in *The People v. Judges of Suffolk*, (24 Wend. 249,) the court decided—Mr. Justice COWEN delivering the opinion—that an appeal to three judges does not lie from a determination which is void for want of jurisdiction. The original order being *coram non judice* and void, is no more the subject of such an appeal than would be a judgment rendered by the commissioners in a civil action. An excess of jurisdiction is correctable by *certiorari* only.

In view of the last two decisions cited, it seems evident that the referees must confine themselves solely to the merits, and cannot inquire as to any of the preliminary proceedings of the commissioners.

To consider damages.—The damages are a proper subject for the referees to consider only so far as to inquire whether the benefit will equal the expense. This must be inquired into by the referees as well as by the commissioners. The referees pass in review upon the acts of the commissioners, and are substituted in their place; all the considerations which are proper for the one, are also proper for the other tribunal. (*Commissioners of Bushwick v. Meserole*, 10 Wend. 126.)

Reversal in part.—The referees may reverse the decision of the commissioners in part, and affirm it as to the residue. (*People v. Baker*, 19 Barb. 240; *People v. Commissioners of Cherry Valley*, 8 N. Y. R. 482.) It was formerly decided that the judges or referees could only affirm or reverse the whole decision, except in a case where the road was laid out by the commissioners without the intervention of the freeholders. (*Commissioners of Sherburne v. Judges of Chenango*, 25 Wend. 453.) But the act of 1847 (*Laws* 1847, ch. 455, § 9), extends the power of the referees on appeal to a partial reversal or modification of the order of the commissioners.

When to lay out or alter road.—Since the referees possess all the powers, and are to discharge all the duties heretofore possessed or discharged by the three judges (*Laws* 1847, ch. 455, § 8), therefore, where an appeal is made from a determination of commissioners refusing to lay out or alter a road, and the referees shall reverse such determination, such referees are to lay out or alter the road applied for; and in doing so, are to proceed in the same manner in which commissioners of highways are directed to proceed in the like cases. Such road shall be opened by the commissioners of the town, in the same manner as if laid out by themselves. (1 R. S. 519, § 91.) The

referees should make such order in relation to the laying out or altering the road, as in their judgment the commissioners should have made. (*People v. Commissioners of Cherry Valley*, 8 N. Y. R. 476; *People v. Champion*, 16 John. 61.) And where they simply reverse a decision of the commissioners, refusing to lay out or alter a highway, a mandamus lies to compel the referees to lay out or alter such highway. (*People v. Barber*, 12 Barb. 193.) The manner in which the commissioners are to proceed in laying out or altering a highway, and which is to be followed by the referees, is fully set forth in the preceding chapters.

In laying out the road on appeal the referees are not limited to the route specified in the application for the road; they may, in the exercise of a sound discretion, make such variations as they think proper. The departure, however, from the route of the proposed road must not be so great as to induce the belief that the preliminary proceedings have been wholly disregarded; the general course of the road must be preserved. (*Hallock v. Woolsey*, 23 Wend. 328; *Woolsey v. Tompkins*, 23 Wend. 324.)

Commissioners to open.—When the commissioners refuse to open the road laid out by the referees on reversing the commissioners' decision, a mandamus lies to compel them to open it. (*People v. Champion*, 16 John. 61.) Such writ is to be directed to "The Commissioners." It is only in case of disobedience to the writ, that the commissioners are to be proceeded against personally. (*Id.*) But where the referees simply reverse an order refusing to lay out a highway, without giving further directions, the commissioners are not bound to lay out the highway, and a mandamus will not be granted to compel them to proceed to do it. (*People v. Commissioners of Cherry Valley*, 8 N. Y. R. 476; *People v. Commissioners of Plainfield*, 7 How. 27.)

4. REFEREES' DECISION AND ITS EFFECT.

Having heard the proofs and allegation of the parties, and agreed upon their decision, they are to reduce such decision to writing, sign it and file it in the town clerk's office. Where they cannot all agree as to the decision of the matter, two of them may decide it and sign the decision. (1 R. S. 519, § 89.) Where several appeals are heard by them, they should embrace the whole matter in the one decision. The order should not be signed until they have deliberated on the matter and agreed upon their decision. Where the referees heard the appeal, and then separated, intending to meet again, but did not, and an order was drawn by the attorney of the appellant and signed by the referees at their several residences, it was held to be ground for reversal. (*Harris v. Whitney*, 6 How. 175.)

Where the referees have heard both parties and duly closed the hearing, and have entered upon the task of forming a determination, they have no power to entertain a motion of third persons to open the cause for a further hearing. The only power then left them is to decide; which includes the incidental powers of adjourning from time to time for that purpose, and to sign and cause to be filed the evidence of their decision. (*People v. Ferris*, 41 Barb. 121.) (For form of decision, see Appendix No. 73.)

Amending decision.—After the decision has been made, the referees have no power to review or alter such decision; but where errors have occurred in the order or certificate filed by them—as in the description of the road—they may file an amended order or certificate correcting such errors. In making up the certificate they act ministerially. (*Woolsey v. Tompkins*, 23 Wend. 324; *Rogers v. Runyan*, 9 How. 248.)

Effect of decision.—It is provided by the 89th section that the decision of the referees, or any two of them, shall be conclusive in the premises. But this means only that it shall be conclusive on the merits as to the particular case in which the appeal is taken, and does not prevent or affect a new application for the same road. (*Pruyn v. Graham*, 1 Wend. 370.) Nor is one person concluded by the decision of another's appeal in the same matter. (*Clark v. Phelps*, 4 Cow. 190.)

The decision of the referees is only conclusive on the merits. They can only entertain, examine and decide the appeal on its merits. But if any irregularity occur in their proceedings, or in the proceedings of the commissioners in making the order appealed from, such irregularity may be corrected by the Supreme Court on *certiorari*. (*Commissioners of Warwick v. Judges of Orange*, 13 Wend. 432.)

5. COMMISSIONERS TO CARRY OUT DECISION.

It is the duty of the commissioners of highways of the town to carry out the decision of the referees in the same manner prescribed by section 13 of chapter 180 of the act of 1845. By that section it was provided that "whenever there shall have been any final determination upon any appeal or appeals provided for as aforesaid, making it necessary that any road or highway shall be laid out, altered, opened or discontinued, it shall be the duty of the commissioner or commissioners of highways of the town where the same is to be done, to carry out such determination the same as if the decision of such commissioner or commissioners had been in favor thereof, and there had been no appeal."

Should the commissioners neglect or refuse to carry out such determination, a mandamus may be had to compel them to do it.

6. EFFECT OF APPEAL.

The appeal operates as a stay of proceedings until the appeal is decided, and the commissioners cannot, in obedience to the decision in A's appeal, lay out a road through B's land while B's appeal is pending. If they do so, they are trespassers. (*Clark v. Phelps*, 4 Cow. 190.) But the appeal operates as a stay only from the time it was taken, and cannot undo or render illegal what has been lawfully done under the order appealed from. (*Drake v. Rogers*, 3 Hill, 604.) Where the determination of the commissioners laying out a road is appealed from, the sixty days' notice to remove fences is to be given after the decision of the referees is filed in the town clerk's office. (*Laws* 1847, ch. 455, § 8.)

Decision to remain unaltered for four years.—The decision of the referees laying out, altering or discontinuing any road, in whole or in part, shall remain unaltered for the term of four years from the time the same shall have been filed in the office of the town clerk. (*Laws* 1847, ch. 455, § 9.) The affirmance of the decision of the commissioners laying out a road, is making a decision laying out a road within the meaning of the statute. The policy of the provision is to prevent litigation for the period specified in regard to the road, after a decision on appeal. (*People v. Pike*, 18 How. 70.)

7. REFEREES' FEES.

Every referee appointed as above provided shall be entitled to receive two dollars for every day employed in the hearing and decision of such appeal or appeals, to be paid by the party appealing where the determination of the commissioners shall be confirmed, but where it is reversed to be a charge upon the county. (*Laws* 1847, ch. 455, § 9.) The statute makes no provision as to who

shall pay the referees' fees where they affirm in part and reverse in part the order of the commissioners. In such case the county would probably be chargeable for such fees.

The affirmance by the referees of an order of commissioners gives them a *prima facie* right to recover their fees of the appellant, and such right is not suspended by the suing out of a certiorari upon such order to the Supreme Court. (*Dissosway v. Winant*, 33 How. 460, reversing same case, 34 Barb. 578.) Where there are several appeals taken by different persons from the same order of the commissioners which are all heard at the same time, the referees are entitled to two dollars for each day occupied in the hearing, as of one appeal only, not two dollars a day as against each appellant separately. (*Id.*) When all the appeals are heard as one, all the appellants are to be regarded as the party appealing, and all jointly liable to pay the referees' fees. Consequently, where the referees in such case bring an action against one of the appellants severally, for their fees, the action cannot be sustained where the defendant sets up, in answer, the non-joinder of the other appellants. (*Id.*) It is undoubtedly consistent for the referees to give each appellant a separate hearing, in which event each would be liable for the time occupied in his particular appeal, although the question was the same in all. (*Id.*)

May assign demand for fees.—The referees may assign their demand for fees, the same as any other demand, and the assignee can maintain an action for their recovery in his own name. (*Id.*)

8. IN WHAT CASES NO APPEAL LIES.

Where the commissioners of highways of two adjoining towns, in different counties, assemble together in joint

board and unite in an order laying out, altering or discontinuing, or refusing to lay out, alter or discontinue a road or highway, their judgment and determination cannot be reviewed by appeal to a county judge of one of the counties. The statute makes no provision for an appeal in such case. The determination of the joint board of commissioners must be considered final, and equivalent in all respects to an order of one board of commissioners, affirmed by three referees on appeal. (*People v. Nelson*, 26 How. 346.)

So an appeal does not lie from a determination of the commissioners, which is void for want of jurisdiction. (*People v. Judges of Suffolk*, 24 Wend. 249.) Nor has a party aggrieved a right of appeal to the county court from the determination of commissioners, ascertaining, describing and entering of record a road used for twenty years. (*People v. Judges of Cortland*, 24 Wend. 491.) What the proper remedy would be in such a case, has not, so far as I know, been decided. But this is certain, that if the proceeding of the commissioners are, in any respect, irregular, or if they have no jurisdiction, or exceed their powers, *certiorari* would be proper. In other cases the party might treat their proceedings as void, and set up the matter complained of in any action for penalty, etc., brought by the commissioners. (*Id.* See also *Allyn v. Commissioners of Schodack*, 19 Wend. 342.)

9. CERTIORARI OF PROCEEDINGS.

Either party, if dissatisfied with the decision of the referees, may sue out a writ of *certiorari* to the Supreme Court to review their proceedings. But on the return of the referees to the *certiorari* no other question can be raised than those relating to the jurisdiction of the referees, and the regularity of their proceedings. (*Birdsall v.*

Phillips, 17 Wend. 464; *Prindle v. Anderson*, 19 Wend. 391; *People v. Goodwin*, 5 N. Y. R. 572; *People v. Van Alstyne*, 32 Barb. 131.) The court on such *certiorari* cannot examine into the *merits* of the appeal, or of the decision—the determination of the referees thereon is final and conclusive, but it may examine into the regularity of their proceedings, and into all questions whether of law or fact on which the referees' jurisdiction depends. (*People v. Goodwin*, *supra*; *Commissioners of Warwick v. Judges of Orange*, 13 Wend. 432.) Among the questions of jurisdiction thus subject to review is the question whether the owner of the inclosed, improved or cultivated lands, through which a highway is laid, has given his consent thereto. (*People v. Goodwin*, 5 N. Y. R. 568.) Also the question whether the persons making the certificate of its necessity were freeholders (*People v. Commissioners of Seward*, 27 Barb. 94); also the question whether they were twelve in number (*Town of Gallatin v. Loucks*, 21 Barb. 578); also the question whether the highway was laid out through the yard or garden of the owner without his consent (*Ex parte Clapper*, 3 Hill, 458), or through an orchard. (*People v. Commissioners of Dutchess*, 23 Wend. 360; see also *People v. Van Alstyne*, 32 Barb. 131.) If any irregularity has intervened previous to the decision of the commissioners, it can be corrected only by *certiorari* directed to the commissioners. (*Commissioners of Warwick v. Judges of Orange*, *supra*.)

Who may have.—The right to have a *certiorari* is reciprocal and belongs as well to the commissioners as to the appellant. (*Commissioners of Kinderhook v. Claw*, 15 John. 537.)

Application for writ.—The application for the writ is founded on affidavit, which should set forth facts showing

a probability that wrong has been done, and that it is of a nature that can be corrected on *certiorari*. The application is to be made to the court at special term. It cannot be made to a judge at Chambers. (*Gardner v. Commissioners of Warren*, 10 How. 181; 12 Barb. 219.) Notice of the application need not in general be given. (*Id.*) (See form No. 74.)

Allowance.—The court may, in its discretion, either allow the writ in the first instance, or grant an order to show cause. (*Matter of Bruni*, 1 Barb. 187.)

Writ and its form.—The writ issues in the name of the people, and should recite the names of the parties aggrieved and set forth the cause of complaint, with the proceedings, and the people's desire to be certified (*certiorari*) of them, and command the referees to certify and return the record and proceedings to the Supreme Court on a specified day, called "return day," so that the court may cause to be done in the matter what of right ought to be done. (*Ex parte Mayor of Albany*, 23 Wend. 277; *People v. Commissioners of Salem*, 1 Cow. 23.)

The writ should be directed to the referees, by name, and give their title as referees appointed by the county judge, etc., and command them to certify and return to the Supreme Court at general term, on a day to be therein named, the appeal, together with the testimony given, and offered to be given on the hearing thereof, with their decision thereon, with all things touching and concerning the same. (*People v. Commissioners of Salem, supra.*)

The writ should be made returnable at general term of the district in which the proceedings sought to be reviewed were had. (*The People v. Kelly*, 35 Barb. 444.) It should be tested, signed and sealed in the usual manner. (2 Burr. Pr. 195.) An indorsement should also be made

upon the writ, signed by the clerk, showing that the writ has issued by order of the court. (*Mott v. Commissioners of Rush*, 19 Wend. 640.) (For form of writ, see Appendix No. 75.)

Effect of writ.—The writ, after service, acts as a stay of proceedings, (*Patchin v. Mayor of Brooklyn*, 13 Wend. 664,) and the commissioners should not proceed to carry out the determinations appealed from until the proceedings on *certiorari* are decided. But the pendency of the *certiorari* does not suspend the right of the referees to collect their fees. (*Dissosway v. Winant*, 33 How. 460.)

When superseded.—If the writ has been improperly granted, a motion may be made to supersede it; as where it was granted before the proceedings removed were wholly terminated; and the motion to supersede it may be made either before or after the writ is returnable. (1 *Crary's Pr.* 161, and cases cited.) So, after the writ is returned, if it is misdirected, or is otherwise bad in point of law, or was irregularly or improperly allowed, the court will order it to be quashed. It cannot be quashed before it is returned, or at least returnable. (*Id.*)

Return to writ.—The referees, prior to the return day mentioned in the writ, must certify and return to the Supreme Court at general term the appeal, together with the testimony given and offered to be given on the hearing thereof, with their decision thereon, with all things touching and concerning the same. The return must show affirmatively that the referees had authority to act; and where their authority and jurisdiction depends upon a fact to be proved before them, and such fact is disputed, they must certify the proofs given in relation to it for the purpose of enabling the higher court to determine whether

the fact be established. (*People v. Goodwin*, 5 *N. Y. R.* 568; *People v. Van Alstyne*, 32 *Barb.* 132.)

The decision of the referees being conclusive as to the *merits*, the court will not compel a return of the evidence relating solely to the merits. (*People v. Van Alstyne*, *supra*.) Such evidence should, however, be included. (For form of return, see Appendix No. 76.)

Proceeding to compel return.—Should the referees refuse or neglect to make return to the *certiorari*, the court may compel them to do so. (2 *Cow.* 575. See further as to the practice on *certiorari*, 1 *Crary's Pr.* 151.)

CHAPTER XII.

OBSTRUCTIONS AND ENCROACHMENTS.

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| 1. Obstructions at common law. | 6. Penalties for obstruction under the statute |
| 2. Obstruction of navigable rivers. | 7. Abatement of obstruction. |
| 3. Encroachment by fences. | 8. Remedy by indictment. |
| 4. Fallen trees to be removed. | 9. Actions for special damages. |
| 5. Swinging gates in highways. | |

1. OBSTRUCTIONS AT COMMON LAW.

The public have a right to an uninterrupted passage along a highway for themselves and their carriages to its utmost extent, unobstructed by any impediment, subject, however, to such temporary obstructions as all public highways must suffer in cases of evident necessity. They are entitled to the use and enjoyment of the whole of a highway, and no individual can appropriate a portion of it to his own exclusive use, and shield himself from responsibility to the public, by saying that enough is still left for the accommodation of others. (*Hart v. Mayor of Albany*, 9 Wend. 584; *People v. Cunningham*, 1 Denio, 524.) An obstruction of a highway for an unreasonable length of time, although in the prosecution of a lawful business, as in the loading or unloading of wagons or drays, or by stages waiting and soliciting passengers, is indictable as a public nuisance, although room enough might still be left for the accommodation of the public on the opposite side of the street. (*Id.*) It is immaterial for what length of time the practice may have prevailed, for it is a well known maxim that *no length of time will legalize a nuisance.*

Any unauthorized obstruction which unnecessarily incommodes or impedes the lawful use of a highway is a public nuisance at common law. (1 *Hawk. P. C. ch.* 76, § 144.) Thus it is a nuisance at common law to dig a ditch or make a hedge or fence across a highway, or to lay logs or lumber therein, or to do any other act which will render it less commodious to the people. (*Wellb. on Highways*, 440.)

What obstructions are allowable.—A temporary occupation, however, of a part of a street or highway by a person engaged in building, or in receiving or delivering goods, from stores and warehouses or the like, is allowed from the necessity of the case; but a systematic and continued encroachment, though for purposes of carrying on a lawful business is unjustifiable. (*People v. Cunningham*, 1 *Denio*, 524.) The necessity to justify such temporary occupation need not be *absolute*; it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure, but inasmuch as fuel is necessary, a man may throw wood in the street for the purpose of having it carried to his house; and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods in the street for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. (*Commonwealth v. Passmore*, 1 *Serg. & Rawle*, 219.) So, one who has occasion to leave a load in a highway must remove it with promptness. If he let it remain there an unreasonable length of time, it may be removed as a nuisance. (*Northrop v. Burrows*, 10 *Abb.* 365.)

It is said to be no nuisance for the inhabitants of a town to unload wood, etc., in the street before their houses, by reason of the necessity of the case, unless they suffer it to continue there an unreasonable time after it is unloaded. (2 *Rol. Abr.* 137 *B.*; 1 *Hawk. P. C. ch.* 76, § 145.)

What are not allowable.—But if the obstruction in such case be continued beyond a reasonable time, it becomes a public nuisance. Thus in the case of *Rex v. Russell*, (6 *East.* 427,) a wagoner was convicted of a nuisance for occupying one side of a public street in a city, before his warehouse, in loading and unloading his wagons for several hours at a time, both by night and by day, and having one wagon at least usually standing before his warehouse, so that no carriage could pass on that side of the street, although there was room for two carriages to pass on the opposite side of the street. The court said that it should be fully understood that the defendant could not legally carry on any part of his business in the public street, to the annoyance of the public; that the primary object of the street was for the free passage of the public and anything which impeded that free passage, without necessity, was a nuisance; that if the nature of the defendant's business was such as to require the loading and unloading of so many more wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot. So in *Rex v. Cross*, (3 *Campb.* 226,) the defendant was indicted and found guilty for keeping coaches at a stand in the street waiting for passengers. The same principle was acknowledged in *Rex v. Jones*, (3 *Campb.* 230,) where the defendant, a timber merchant, occupied a small yard close to the street, and from the smallness of his premises, was obliged to deposit the long pieces of timber in the street, and to have them sawed up

there, before they could be carried into the yard. It was argued that this was necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican. But Lord ELLENBOROUGH said: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises by taking the public highway into his timber yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." Again, in *People v. Cunningham*, (1 Denio, 524,) where the defendants, brewers, were in the habit of delivering their slops in the public street to purchasers, and the street was obstructed and rendered inconvenient by the carts and teams resorting thither for it and waiting for a load, it was held that the defendants were guilty of a nuisance, and that the consideration that the teams and wagons were not owned by them, or under their control, did not excuse them, they having in effect, by the manner of conducting their business, invited these assemblages at that place.

The fact that the defendants' business is lawful, does not afford them a justification in annoying the public in transacting it; it gives them no right to occupy the public highway, so as to impede the free passage of it by the citizens generally. (*Id.*)

The case of *Rex v. Carlisle*, (6 Carr & Payne, 636,) was somewhat analogous to the case last cited. The

defendant, who was a bookseller in Fleet street, having been distrained for the non-payment of a church rate, put into one of his windows the effigy of a bishop of the Established Church, under which was written "Spiritual Broker," and into the other window, a man in ordinary dress, under which was written "Temporal Broker," and afterwards added the figure of the devil, through the arm of which was tucked that of the bishop. The exhibition attracted a crowd to look at it, so that passengers were obliged to go off the foot-path into the carriage way, as there was not room for them to walk on the foot-pavement. PARKER, J., admitting that the defendant had a right to do as he chose on his own premises, provided he did nothing to injure or annoy his neighbors, or the public, instructed the jury that, if the exhibition caused the foot-way to be obstructed, so that the public could not pass as they ought to do, this was an indictable nuisance, and that it was not essential that the figures should be libelous, or that the crowd attracted should consist of idle, disorderly and dissolute persons. He said, "if a place is situated near a highway, and the defendant do that which causes the persons passing, to be prevented from passing as they ought to do, and, beside this, people are annoyed in the occupation of their houses, this is a nuisance for which the party is indictable."

It is, no doubt, a nuisance to dig a ditch or lay logs or wood in a highway; and whosoever sustains an injury from such a cause, without any fault of his own, may maintain an action against the author of it. (*Harlow v. Humiston*, 6 Cow., 189.) But all lands within a highway fence are not necessarily subject to the right of way, and where they are not so subject, they may be occupied by the owner, and if he place an obstruction there and another is injured by it, he is not, therefore, liable. (*Id.*) Where the road is laid out by the commissioners, the

public are entitled to the uninterrupted and free use of the road, to the full width laid out; and where the road is claimed by user, the extent of such user determines its width. But the public are not entitled to the use of the road to a greater width than laid out in the one case, or used in the other; and if a man occupy his lands beyond those limits, without fencing it, and place an obstruction there, he cannot be made liable to one injured thereby.

Any act of an individual done to a highway, though performed on his own soil, if it detract from the safety of travelers, is a nuisance. Therefore, where the owner of lands, over which a highway passes, digs a raceway across the road to conduct water to his mill, he must restore the road to as good and safe condition as it was before the race was built, by building and maintaining a bridge over it, or otherwise; and if an injury occurs by reason thereof, though he use the utmost care to prevent it, he is, in the absence of gross negligence on the part of the party injured, liable for damages, and the raceway will be adjudged a nuisance. (*Dygert v. Schenck*, 23 Wend., 446.) So a ditch dug in a public highway which, from the local circumstances of the country, is seldom or never used but by one or more families, is still a public nuisance, not because any considerable portion of the public is actually affected by it, but because it obstructs a passage which all have a right to use. (*Lansing v. Smith*, 8 Coven, 152.)

Whatever is permitted by a statute which the Legislature is constitutionally competent to pass, is not, in judgment of law, a nuisance. (*Leigh v. Westervelt*, 2 Duer, 618; *Williams v. N. Y. Central R. R. Co.*, 18 Barb. 222.) Unless there is an excess or irregularity in the exercise of the power conferred, in which case it becomes

a public nuisance *pro tanto*. (*Renwick v. Morris*, 3 *Hill*, 621; *affirmed*, 7 *Hill*, 575.)

"It seemeth," says Mr. HAWKINS, (1 *Hawk. P. C. ch.* 76, § 15) "that an heir may be indicted for continuing an encroachment or other nuisance to a highway, began by his ancestor, because such a continuance thereof amounts, in the judgment of law, to a new nuisance." Yet, in Austin's case, (1 *Ventr.* 183,) in an indictment for erecting posts and rails in a highway, it was held necessary to prove that the party indicted set them up; for a continuance of them, or not suffering them to be removed, would not serve.

If a house on the highway be ruinous, and likely to fall down, it is a nuisance, and the occupier is bound to repair it, although he be tenant at will, for where the danger concerns the public, they look to the occupier and not to the estate. (*Queen v. Watts*, 1 *Salk*, 357.)

2. OBSTRUCTION OF NAVIGABLE RIVERS.

It has been before said (*ante p.* 15) that a navigable river common to all men, is a highway: and it is governed by the same rules, so far as obstructions and nuisances are concerned, as are highways on the land. All citizens may use it only as a highway for purposes of navigation. They have no right exclusively to occupy any part of it, by either floating or permanent buildings or obstructions. (*Hart v. Mayor of Albany*, 9 *Wend.* 584.) The right of each citizen to use such river as a highway must, everywhere, within reasonable limits, accommodate itself to the same right in the public at large. Every unauthorized obstruction of a navigable river is a public nuisance.

Lord HALE, in his treatise *De Jure Maris*, 9, after stating the clause in *magna charta*, which directs the removal of nuisances, says: "These nuisances are such as hinder or obstruct the passage of boats: as wiers, piles, choaking up

the passage with filth, diverting of the river by cuts or trenches, decay of banks, or the like."

Mr. HAWKINS says: "It seems certain that it is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. (1 *Hawk. P. C. ch.* 75, § 11.) So it is a common nuisance to lay timber in a public river, although the soil on which it is laid belong to the party, provided it obstruct the necessary intercourse. (3 *Bac. Abr.* 686.) So, it is unlawful for an individual, without special authority, to construct and moor a floating storehouse or vessel for the purpose of receiving and delivering goods and merchandize in any public river, or in any port or harbor. Such permanent appropriation and exclusive occupation of a portion of a public river, is an obstruction to its free and common use, and is indictable as a public nuisance. (*Hart v. Mayor of Albany*, 9 *Wend.* 571; see also *People v. Vanderbilt*, 26 *N. Y. R.* 287.)

The erection of a building on the bank of a navigable river, below the line of low water, is not *per se* a nuisance. (*Wetmore v. Atlantic White Lead Co.* 37 *Barb.* 70.)

3. ENCROACHMENTS BY FENCES.

How removed.—In every case where a highway shall have been laid out, and the same has been, or shall be, encroached upon by fences erected by any occupant of the land through or by which such highway runs, the commissioners of highways of the town shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended. The commissioners making the order shall cause the same to be reduced to writing, and signed. They shall also give notice in writing, to the occupant of the land, to remove such fence within sixty days.

Every such order and notice shall specify the breadth of the road originally intended, the extent of the encroachment, and the place or places in which the same shall be. (1 R. S. 521, § 103.)

No person shall be required to remove any fence under the preceding provision, except between the first day of April and the first day of November in any year. (1 R. S. 522, § 103.)

Penalty for not removing.—If such removal shall not be made within sixty days after the service of such notice, the occupant to whom the notice shall be given shall forfeit the sum of fifty cents for each day after the expiration of that time for which such fences shall continue unremoved, and the commissioners of highways may remove, or cause to be removed, such encroachment; and the occupant of the premises shall pay to the commissioners of highways all reasonable charges therefor, to be collected in the manner provided in the forty-fifth section of said title. (1 R. S. 522, § 104.)

Proceedings.—To bring a person in default for not obeying the order of the commissioners, and render him liable for the penalties for an encroachment on the highways, it is necessary that the commissioners should meet, deliberate and decide on the alleged encroachment, and give notice to the party to remove his fences within sixty days, which notice ought to state specially the breadth of the road originally intended, the extent of the encroachment, and the place or places where, so that the party may know how to obey the order for removing his fence. (*Spicer v. Slade*, 9 John. 359.)

When the encroachment is not denied, all the commissioners must confer together in regard to making an order for its removal, or be duly notified to attend a meeting of

the commissioners for the purpose of conferring thereon and the majority may act (1 *R. S.* 525, § 125); but when the encroachment is denied, and the fact is to be enquired into by a jury, it was held, in an early case, that one of the commissioners only may act, and make complaint to a justice of the peace; or that, at least, a want of joint consultation of all the commissioners will not vitiate an inquest subsequently found. (13 *John.* 460.) The safer course is, however, for all the commissioners to meet and deliberate, or to have notice to meet and deliberate on the matter, before the notice is given in every case.

And in *Fitch v. Commissioners of Kirkland*, (22 *Wend.* 132,) it was held that an order for the removal of fences, made by two commissioners in the case of an encroachment on a highway was void, it not appearing on the face of the order that the third commissioner was duly notified to attend a meeting of the board for the purpose of deliberating on the subject of the order.

The breadth of the road originally intended, the extent of the encroachment, and the place or places in which the same shall be, must be given with precision. In *Mott v. Commissioners of Rush*, (2 *Hill*, 472,) the court held it to be an incurable defect that the notice and order omitted to specify the original breadth of the road, and the extent and places of the encroachment. The order and notice in that case described the encroachments as being "of the average width of one rod or upwards." It was insufficient: "The statute," says the court, "is very explicit, and for an obvious reason, viz: to enable the party, if he see fit, to comply with the order at once." The description should be full and precise, so as to fix the place and extent of the encroachment beyond all doubt or embarrassment to the occupant. The commissioners are required to put the party in possession of all the particulars of the encroachment necessary to enable him to go upon the

ground, where it is alleged to exist, and remove it at once. (For form of order and notice, see Appendix Nos. 77, 78.)

How width to be ascertained.—The commissioners are to ascertain the width from the survey of the road recorded with the order laying it out. In *Talmage v. Hunting*, (29 *N. Y. R.* 447,) which was an action to recover penalties for encroachments, alleged to have occurred on a highway, brought under an act regulating highways in the counties of Suffolk, Kings and Queens, under which act the provision, with regard to encroachments, is not limited to laid out highways, the court held that, before it can be determined whether a particular highway has been encroached upon, its limits and boundaries must be ascertained and determined in some mode prescribed by law; and that the jury called to determine the disputed question of an encroachment, has no power to determine the question of width and boundaries.

Highway must have been laid out.—It is pretty conclusively settled that there can be no proceedings by the commissioners to remove an encroachment on a highway under the above provisions, unless the highway has been *laid out and recorded* in conformity with the directions of the highway act.

The fact that a road has been *used* as a highway for twenty years or more, will not give the commissioners jurisdiction to proceed against an individual for an encroachment thereon by fences, unless such road has been laid out and recorded as a public highway. This was directly decided in *Doughty v. Brill*, (36 *Barb.* 488.) It is true that in *Chapman v. Gates*, (46 *Barb.* 313,) Mr. Justice BALGOM was of opinion that the commissioners could recover the penalty for an encroachment, “upon evidence that the highway had been worked and used by

the people as a public highway, and regarded as such for fifteen years before the defendant obstructed it." But this opinion of the learned judge was wholly *obiter*, and is not sustained by the decisions. In *Tucker v. Rankin*, (15 Barb. 482,) JOHNSON, J., who delivered a dissenting opinion, said: "I am unable to agree with my brethren in this case. We fully agree that highway commissioners are only authorized to order the removal of fences as encroachments upon highways, in cases where highways have been laid out according to statute." The only point of disagreement in the case was as to what constitute a laid out highway within the meaning of the statute, that is, as to whether the fact that but two of the commissioners were present at the survey, and signed the paper designated by that name was a fatal objection. The majority of the court held that it was not, and that in the absence of evidence to the contrary it would be presumed that the third commissioner met and consulted with them in reference to their proceeding at or before the time the paper was signed.

Again, in *Talmage v. Hunting*, (29 N. Y. R. 453,) which was an action for penalties for encroachment, under the Long Island road act. The court said: "It is true, as suggested by the appellants' counsel, that the provision of the act in question, in regard to encroachments is not, in terms, confined to laid out highways, as in the revised statutes, but extends to every case of a highway encroached upon." The statute itself is sufficiently definite in the matter, and only gives the remedy "in every case where a highway shall have been laid out."

Proof of laying out.—Although it is essential that the road shall have been laid out and recorded, yet it is not necessary that the commissioners prove all the proceed-

ings preliminary to the laying out of the road. It will be sufficient for them to show the record thereof, and that it was opened and used as a public highway. (*Sage v. Barnes*, 9 John. 365; *Chapman v. Gates*, 46 Barb. 313.)

Where highway is discontinued.—If a highway is obstructed by a fence, and the commissioners discontinue the highway, the fence thereupon ceases to be a public nuisance, and an appeal from the order discontinuing such highway does not make the fence illegal. (*Drake v. Rogers*, 3 Hill, 604.) But the owner of the land cannot himself work an abandonment of a highway by obstructing it; the public alone can do that by a non-user for twenty years, or by such an entire and absolute abandonment as can leave, under the circumstances, no question of intent. (*Amsbey v. Hinds*, 46 Barb. 622.)

How penalty collected.—It is provided that the penalties and charges for removing the fences shall be “collected in the same manner provided in the forty-fifth section of said title.” This is evidently a mistake, for the forty-fifth section does not provide any manner for collecting penalties.

The penalty should be collected by bringing an action before a justice of the peace in the same manner that other actions are commenced. See as to the manner in which commissioners are to sue, *ante p.* 96, *et seq.*

Plea of title.—Some doubt has existed in the courts as to whether a plea of title by a defendant sued for penalties for encroaching on a highway, ousted the justice of jurisdiction. In *Parker v. Van Houten*, (7 Wend. 145,) it was held that a plea of title was no bar to an action by commissioners for an obstruction of a highway, inasmuch as the public did not claim title, but only an easement of

passage. But in *Randall v. Crandall*, (1 *Hill*, 342,) it was held that the question of right of way, either public or private, is a question of title to real property which a justice of the peace has no jurisdiction to try. This case was cited in *Little v. Denn*, (3 *Abb. N. S.* 235,) which was a case in the Court of Appeals, and it was there said that the question was well settled. However, if the defendant wishes to take objection to the jurisdiction of the justice on the grounds that the question of right of way involves a question of title, he must, at the time of answering, deliver the undertaking prescribed by section fifty-six of the Code; and if he do not deliver such undertaking, he is precluded from drawing the title or right of way in question in his defence. (*Id.*)

But though the defendant, by omitting to give the requisite undertaking, has precluded himself from drawing the right of way in question, he has the right to introduce evidence to show that the obstruction complained of, is not within the boundaries of the highway. This does not involve the question of title. (*Id.*)

Where encroachment is denied.—If the occupant to whom notice is given shall, within five days, deny such encroachment, the commissioners, or some one of them, shall apply to any justice of the peace of the county, for a precept directed to any constable of the town, to summon twelve freeholders thereof, to meet at a certain day and place, to be specified in such precept, and not less than four days after the issuing thereof, to inquire into the premises. The constable to whom such precept shall be directed, shall give at least three days' notice to the commissioners of highways of the town, and to the occupant of the land, of the time and place at which such freeholders are to meet. (1 *R. S.* 522, § 105.) (For forms herein, see Appendix No. 79.)

The denial of the occupant must be in writing. (*Lane*

v. *Cary*, 19 *Barb.* 537.) The application of the commissioners to the justice should also be in writing. The statute, by freeholders, means such as have the legal title to real estate—such as are freeholders without a proceeding in court to make or declare them so; a *legal* title is requisite. (*People v. Hynds*, 30 *N. Y. R.* 472.) See further as to the freeholders, *ante* chapter VIII, *sub.* 6.

It was held in *Pugsley v. Anderson*, (3 *Wend.* 468), that the justice acted ministerially in these proceedings, and had no duty to perform except to issue the precept for the jury, and to swear the jury and witnesses; and that he had no right to decide upon the qualifications of the jurors. But by the act of 1862, (*ch.* 243, § 1), it is provided that the justice shall preside at the trial in the same manner as upon trial of an issue joined in a civil action commenced before him, and that he shall have the power, and it shall be his duty to decide as to the competency of the jurors, the competency and admissibility of evidence, and all other questions which may arise before him in the same manner, and with the like effect, as upon a jury trial in civil actions before him. The justice should not annex to the precept the list of jurors to be summoned. If he should do so, the proceeding would be irregular, but the irregularity is waived by appearing and taking no objection to the jury on that ground. (*Mott v. Commissioner of Rush*, 2 *Hill*, 472.)

Proceedings on trial.—On the day specified in the precept, the jury so summoned shall be sworn by such justice, well and truly to inquire whether any such encroachment has been made and by whom; such witnesses as may be produced by either party shall also be sworn by such justice, and the jury shall hear the proofs and allegations which may be produced and submitted. (1 *R. S.* 522, § 106.) (For form of oath, see Appendix No. 80.)

Upon the hearing before the jury, as provided in the above section, the justice who has issued the precept to such party, shall preside at the trial in the same manner as upon the trial of an issue joined in a civil action commenced before him; six of the jurors summoned shall be drawn and empaneled in the same manner as upon trial by jury in civil actions before him, and he shall have the power, and it shall be his duty to decide as to the competency of jurors, the competency and admissability of evidence, and all other questions which may arise before him, in the same manner and with the like effect as upon a jury trial in civil actions before him; and such justice shall adjust and determine the cost of such inquiry, and in case the jury shall find an encroachment, he shall render and docket a judgment to that effect, and for such costs against the person or persons who shall have denied such encroachment; in case the jury find no encroachment, he shall render and docket a judgment to that effect against the commissioner or commissioners prosecuting the proceedings, and also for such costs, together with the damages, if any, which may have been fixed by the jury, and payment thereof shall be enforced by such justice, as in other cases of judgment rendered by him. (*Laws of 1862, ch. 243, § 1.*)

The judgment finding that an encroachment has been made, should state the particulars of the encroachment, so as to guide the party in removing it. (*Fitch v. Commissioners of Kirkland, 22 Wend. 132.*) Should the jury disagree, the justice may discharge them and issue a new process to summon another jury. (*People v. Cortelyou, 36 Barb. 164.*)

It was provided by §§ 107, 108 of the Revised Statutes, (1 *R. S.* 522,) that if the jury find that any encroachment has been made, they shall make and subscribe a certificate, in writing, stating the particulars of such encroachment,

and by whom made; which shall be filed in the office of the town clerk. The occupant of the land, whether such encroachment shall have been made by him or by any former occupant, shall remove his fences within sixty days after the filing of such certificate, under the penalty provided in the one hundred and fourth section of this title (cited above). He shall also pay the costs of such inquiry; and if the same shall not be paid within ten days, the justice shall issue a warrant for the collection thereof in the manner provided in the forty-third section of this title.

If the jury find that no encroachment has been made, they shall so certify, and shall also ascertain and certify the damages which the then occupant shall have sustained by such proceeding; which, together with the costs thereof, shall be paid by the commissioners, and shall be charged in their favor against the town by which they shall have been elected.

It is provided by the act of 1862, the first section of which is above cited, that the payment of the judgment rendered by the justice, in case of encroachments, shall be collected in the same manner as in other cases of judgment rendered by him, so that the provisions in section one hundred and seven, above cited, in relation to the collection of the judgment, is superseded. But in other respects there does not appear to be anything in the act of 1862 inconsistent with the sections last cited.

The jury should make and subscribe a certificate in writing, stating the particulars of the encroachment, and by whom made, and the same should be filed in the town clerk's office. The occupant has sixty days to remove the fence after the filing of such certificate.

Right of appeal.—The person or party against whom such judgment shall be rendered, may, within sixty days

after filing the certificate of the jury, appeal from the finding and judgment to the county court of the same county; such appeal shall be made by the service, within twenty days after the docketing of said judgment, of notice of appeal upon the justice and upon the successful party or parties, or one of them, stating the grounds of such appeal. It shall be the duty of such justice, in his return to such appeal, to embrace copies of all the papers made and served in the proceeding prior to issuing the precept for such jury, and all evidence and proceedings before him, together with the finding of the jury and judgment entered thereon. All the provisions of title eleven, chapters third and fifth of the Code of Procedure are extended to such appeals, so far as the same are applicable thereto. (*Laws 1862, ch. 243, § 2.*)

Title eleven, chapters third and fifth of the Code relate to "appeals to the Supreme Court from an inferior court," and "appeals to the Court of Common Pleas for the city and county of New York, or to a County Court from an inferior court," so that appeals from the judgment in case of alleged encroachments, as above provided, are governed by the same rules, and are to be taken in the same manner as in civil cases.

Judgment on appeal.—In case the decision of the jury finding an encroachment shall be affirmed by the Appellate Court, such court, in addition to the cost now allowed by law, may, in its discretion, order judgment against the appellant for the penalties provided by section one hundred and four of article one, title one, chapter sixteen, part first, of the Revised Statute aforesaid (above cited,) for such period as shall intervene between the time fixed for the removal of fences, as provided by section one hundred and seven of the said article, title and chapter (above cited), and the decision of such appeal; and in case of

the continued neglect or refusal of the occupant, after judgment, to make such removal, the court rendering judgment may, by order, from time to time, enforce the additional penalties incurred, or may provide for the removal of such fences at the expense of the occupant; payment of such expense to be enforced by order. Such application to be made according to the usual practice of the court. (*Laws 1862, ch. 243, § 3.*)

When fences to be removed.—No person shall be required to remove any fence under the preceding provisions of this article, except between the first day of April and the first day of November, in any year. (1 *R. S.* 522, § 109.)

4. FALLEN TREES TO BE REMOVED.

If any tree shall fall, or be fallen, by any person, from any enclosed land into any highway, any person may give notice to the occupant of the land from which such tree shall have fallen, to remove the same within two days. If such tree shall not be removed within that time, but shall continue in such highway, the occupant of the land shall forfeit the sum of fifty cents for every day thereafter, until such tree shall be removed. (1 *R. S.* 523; § 110.)

Penalty for falling trees.—In case any person shall cut down any tree on land not occupied by him, so that it shall fall into any highway, river or stream, unless by order and consent of the occupant, the person so offending shall forfeit, to such occupant, the sum of one dollar for every tree so fallen, and the like sum for every day the same shall remain in such highway, river or stream. (1 *R. S.* 523; § 111.)

Removing trees from streams.—Whoever shall cut, or cause to be cut down, any tree, so that the same shall fall

into any river or stream which now is, or hereafter shall be declared a public highway, and shall not remove the same out of such river or stream, within twenty-four hours thereafter, shall forfeit five dollars for every tree so cut down and left remaining. (1 R. S. 523; § 112.)

The Legislature have, from time to time, declared certain rivers and streams public highways, and reference must be had to the several acts. They would occupy too much space to enumerate them here. All rivers, where the tide ebbs and flows, are public highways, without an act of the legislature. (See *ante* p. 15.)

Trees may be planted.—The statute has empowered owners of land adjoining a highway to plant shade trees thereon. Any person owning land adjoining any highway, not less than three rods wide, may plant or set out trees on the side of such highway contiguous to his land, which trees shall be set in regular rows, at a distance of at least six feet from each other. Whoever shall cut down, destroy or injure any tree that has been, or shall be so planted or set out, shall be liable, in damages, to the owner of such adjoining land. (1 R. S. 525, § 127.)

By the act of 1863, (*ch.* 93,) it was provided that all persons owning land fronting on any highway, (except in cities and incorporated villages,) may make sidewalks and plant trees along the road side. Such sidewalk, with shade trees, shall not extend more than six feet in width from the outer line of the highway, where the highway is three rods wide or under; but where it is over three rods wide the owner may add one foot in width for every additional rod in width in the highway.

5. SWINGING GATES IN HIGHWAY.

No swinging or other gates shall be allowed on any public highway, laid out by virtue of this title, or which

has heretofore been laid out, other than such public highways as run through lands liable to be overflowed by the waters of the adjacent rivers or streams, in such a manner as to remove the fences thereon. (1 R. S. 523, § 113.)

How erected and preserved.—Such gate shall be erected and kept in good repair by the overseers of highways of the town, at the proper costs and charges of the occupants of the land, for whose benefit the same shall be erected. (*Id.* § 114.)

Expenses by whom paid.—If more than one gate shall be erected, and the intermediate land between the gates at the extremities of such lands shall be in the occupation of more than one person benefited by such gates, the whole charge of erecting and keeping the same in repair shall be borne by all the occupants benefited thereby, in proportion to the extent of land each occupies adjoining the highway, between the gates and the extremities aforesaid. (*Id.* § 115.)

The overseer of every road district in which such gates shall be, shall, on or before the first day of November, in every year, make out and file with the town clerk, a statement of the charges incurred in the erection or repairing of such gates, with the name of the person bound to defray the same, which account shall be verified by the oath of such overseer. If more than one person is liable to defray such charges, the statement shall also contain an apportionment thereof between such persons, stating the amount to be paid by each. (*Id.* § 116.)

The overseer shall, within ten days after filing the statement, demand of every person bound to pay such charges, or to contribute thereto the sum due from him according to such statement, and if any person shall refuse or neglect to pay such moneys within six days after demand, it

shall be the duty of the overseer to make complaint to a justice of the peace of the town, and the like proceeding shall be had for the recovery of such money, as in the recovery of fines for refusing or neglecting to work on the highways. (1 *R. S.* 524, § 117.)

Gates to be closed.—The commissioners of highways shall file an account of such gates in the town clerk's office; and if any person shall open any such gate, and shall not, immediately after having passed the same, close it, or shall willfully or unnecessarily ride over any of the grounds adjoining the road on which such gates shall be permitted, he shall forfeit to the party injured treble damages. (*Id.* § 118.)

6. PENALTIES FOR OBSTRUCTION UNDER THE STATUTE.

Whoever shall obstruct any highway, or shall fill up or place any obstruction in any ditch constructed for draining the water from any highway, shall forfeit for every such offence the sum of five dollars. (1 *R. S.* 521, § 102.)

Treble damages.—It is also provided, that whoever shall injure any highway, by obstructing or diverting any creek, water-course or sluice, or by drawing logs or timber on the surface of any road or bridge, or by any other act, shall, for every such offence, forfeit treble damages. (1 *R. S.* 526, § 130.)

These provisions are merely cumulative. The first affords no redress for private injury—but a party injured may waive the treble damages, and sue for single damages. (*Dygart v. Schenck*, 23 *Wend.* 451.)

This is a penalty recoverable by the commissioners. They cannot maintain an action on the case for damages done the road; their remedy is by indictment, summary abatement, or action for the penalty; private remedies are

confined to the owner of the soil, or persons who have sustained a particular injury. (*Cornell v. Butternuts &c. Turnpike Co.* 25 *Wend.* 368.)

On what highways.—The penalty of five dollars and that of triple damages are not limited to obstructions of laid out highways, but apply to all public highways, whether acquired by dedication, user for twenty years, or by laying out under the statute. After a road has become a public highway by user, as such for twenty years or more, a person obstructing it incurs a penalty for so doing, although the commissioners have not caused the road to be ascertained, described and entered of record. The commissioners can maintain an action to recover the penalty of five dollars for such obstruction. (*Devenpeck v. Lambert*, 44 *Barb.* 596.)

As to encroachment by fences.—If the encroachment by fences upon the highway is of such a nature that no one using the highway is incommoded, then it is no nuisance, and cannot be summarily abated either by the commissioners or others. (*Griffith v. McCullum*, 46 *Barb.* 561.) Nor does it appear to be an obstruction within the meaning of the statutes cited above. Ample provision has been made for removing fences that encroach on highways, and the manner provided should be strictly followed. However, where a fence is an obstruction to travel, it may be abated or indicted. (*Wetmore v. Tracy*, 14 *Wend.* 250.)

The statute providing penalties for obstructions and encroachments, has not taken away the common law remedies of abatement and indictment. (*Id.*)

Penalties how recovered.—All penalties or forfeitures given in this title, and not otherwise provided for, shall

be recovered by the commissioners of highways of the town in which the offence shall be committed; and when recovered, shall be applied by them in improving the roads and bridges in the town. (1 R. S. 526, § 131.)

The commissioners cannot maintain an action in their official name or title, but must use their individual names, annexing their official title thus, "A, B and C, commissioners of highways of the town of Pittstown, in the county of Rensselaer, plaintiffs." There must also be an allegation in the complaint, setting forth their official character. (See further herein, *ante*, p. 96.)

The commissioners of two towns cannot unite as plaintiffs in an action to recover a penalty or forfeiture for an encroachment, upon a highway laid out upon the line between their two towns. (*Bradley v. Blair*, 17 Barb. 480.)

7. ABATEMENT OF OBSTRUCTION.

The common law remedy for a nuisance or obstruction of highway is, by abatement or indictment; a nuisance in the public highway, may be *abated*, that is, removed or destroyed by any individual who wants to use the highway, in a lawful manner, and is injured or incommoded by such a nuisance. (*Griffith v. McCullum*, 46 Barb. 561; see, also, *Hart v. Mayor of Albany*, 3 Paige, 213; 9 Wend. 571; *Denning v. Roome*, 6 Wend. 651; *Wetmore v. Tracy*, 14 Wend. 250.) But this right of abatement does not extend to the removal of every encroachment upon a highway, unless such encroachment annoys and obstructs its lawful use. Every encroachment is not a nuisance. A nuisance must be something that *annoys* the public. (*Griffith v. McCullum*, *supra*; *Harrower v. Ritson*, 37 Barb. 301; *Hopkins v. Crombie*, 4 N. Hamp. 520; *Burnham v. Hotchkiss*, 14 Conn. 311.) Thus, if the encroachment of a fence on a highway is of such a nature that no one, in using the highway, is incommoded by it, then it

Is not a nuisance and cannot be abated. (*Griffith v. McCullum, supra.*) The same principle was decided in *Harrower v. Ritson, (supra.)* In *Burnham v. Hotchkiss, (supra.)* the court held that whether or not a given obstruction is a nuisance, is a question of fact for the jury; and that an abatement is not justified unless the public travel is, by reason thereof, actually obstructed, hindered or endangered; and the more recent decisions in this State are in harmony with those views.

Who may abate obstructions.—It seems, also, to be fully established, by recent cases, that if there be a nuisance in a public highway, a private individual cannot, of his own authority, abate it, unless it does him a special injury; a public nuisance becomes a private one to him who is specially, and in some particular way, inconvenienced thereby, as in the case of a gate across a highway, which prevents a traveler from passing, and which he may, therefore, throw down. (*Griffith v. McCullum, 46 Barb. 561; Harrower v. Ritson, 37 Barb. 301, and cases cited.*)

The abatement by an individual must be limited by its necessity, and no wanton or unnecessary injury must be committed. (*Id.*) But, although one injured may abate a common nuisance obstructing a highway, and remove the materials; yet, he cannot convert them to his own use. (1 *Hawk, P. C.* 76, § 187.) And the right seems, also, to be qualified by the exception, that it cannot lawfully be exerted if its exercise, involve a breach of the peace. (*Day v. Day, 4 Maryland, 262.*)

8. REMEDY BY INDICTMENT.

Indictment is the appropriate remedy against individuals for positive obstructions of a highway. And whatever may be the law in regard to the abatement, it would

seem that the author of a nuisance, within the limits of a highway, is liable to indictment. Whether such nuisance actually obstructs the public travel or not, the public have the right to the entire width of the road, a right of passage in the road to its utmost extent, unobstructed by any impediment; and whoever puts any permanent or habitual obstruction therein is indictable, although there be room enough left for carriages to pass. (See *Harrower v. Ritson*, 37 Barb. 301; *Griffith v. McCullum*, 46 Barb. 561, and cases cited.) Where such obstruction exists, both the party who created it and the party who continues its use or maintenance, are liable to indictment. (1 Hawk. P. C. ch. 76, § 157; *Rex v. Stoughton*, 2 Saund. 158, note.) And it is no defence for a master or employer, that a nuisance is caused by the acts of his servants, if such acts are done in the course of their employment; nor, on the other hand, is it any defence for the party causing the nuisance, that he was only acting as an agent or overseer for another. (*State v. Bell*, 5 Porter, (Ala.) R. 365.)

Nor is it any defence that the teams and carts that obstruct the highway are not owned by the defendant, nor under his control, provided the gathering of the teams and carts at the place is caused by the manner in which the defendants conduct their business. (*People v. Cunningham*, 1 Denio, 524.) So a party cannot defend an indictment for nuisance by showing its continued existence for such length of time as would have established a prescription against individuals. (*Id. Mills v. Hall*, 9 Wend. 315.)

Of commissioners.—The commissioners of highways may be indicted for neglect to repair the roads, where they have the necessary funds in their hands; and the having of such funds should be alleged in the indictment. In the absence of such allegation the indictment is defective. (*People v. Adsit*, 2 Hill, 619; 4 Hill, 630.) And an

Indictment against a commissioner or overseer of highways ought to state when he was elected, when his office commenced, and when it terminated, that he was in office during the period complained of, and that the road was in his district. (*State v. Hageman*, 1 *Green (N. J.) R.* 314.) The indictment should also specify the particular road, or parts of roads, suffered to be out of repair.

9. ACTIONS FOR SPECIAL DAMAGES.

Although it is a general rule that a private action cannot be maintained for a public injury, as for a common nuisance, yet, if an individual suffer a more special injury than any other from such nuisance, he may have a separate action therefor. (*Vin. Abr. Titchimin Common D.* 2; 1 *Coke Inst.* 56, a; *Myers v. Malcolm*, 6 *Hill*, 292, and cases cited; *Lansing v. Smith*, 4 *Wend.* 9.)

The foundation of every such action is the special damage. The nuisance *per se* gives no cause of action. It is strictly analogous to an action of slander for words not actionable in themselves, or an action by a master for the beating of his servant, or of a parent for the debauching of his daughter. In all these cases, the *gist* of the complaint is special damage. It is that, and that alone, which entitles the plaintiff to recover. (*Lansing v. Smith*, 8 *Cow.* 153.)

It appears to be pretty conclusively settled, that the special injury resulting from a public nuisance which will sustain a private action, must be peculiar to the plaintiff, and not common to him and many others; if it operates equally, or in the same manner upon many individuals constituting a particular class, though a very small portion of the community, it is not a special damage to each within the meaning of the rule. (*Lansing v. Smith*, 8 *Cow.* 146; *Butler v. Kent*, 19 *John.* 223; *Pierce v. Dart*, 7 *Cow.*

609; *Mills v. Hall*, 9 *Wend.* 315; *Dougherty v. Bunting*, 1 *Sandf.* 1.)

In *Lansing v. Smith*, *supra*, Mr. Justice SOUTHERLAND, gave the subject a most careful and exhaustive examination, citing and distinguishing the principal English and American cases, and he came to the conclusion above stated. The judgment in the case was in accordance with those views, and it was affirmed by the Court of Errors, (4 *Wend.* 9,) although on other grounds. The chancellor who delivered the controlling opinion in the latter court was, however, of opinion that every individual who receives actual damage from a nuisance, may maintain a private action for his own injury, although there are many others in the same situation; and his opinion was approved in *The First Baptist Church v. Schenectady, &c., R. R. Co.* (5 *Barb.* 79;) see, however, *First Baptist Church v. Utica, &c., R. R. Co.* (6 *Barb.* 313.) In a recent case the principle that there must be some special damage to the plaintiff, not sustained by the rest of the community, to enable him to maintain the action, was affirmed. (*Fort Plain Bridge, Co. v. Smith*, 30 *N. Y. R.* 44.)

An individual who receives a bodily hurt, or suffers a damage to his horse or carriage in consequence of a direct collision with an obstruction in the highway, is specially damnified, and may maintain an action against the author of the obstruction.

But there are cases in which it is not easy to distinguish the damage which is peculiar to the individual, from that which is common to him, with the rest of the public. It has been held that the being put to the necessity of going a circuitous route, or the being delayed on a journey by which some important affair is neglected, is not sufficient of itself to warrant the action.

(*Pierce v. Dart*, 7 Cow. 609, and cases there cited.) So the construction of a basin and erections in a river, whereby the docks, etc., owned by individuals above, were rendered inaccessible or less easy of approach, does not authorize a private action at the suit of one of the dock owners, though he should show his share of the common injury to be greater than that of the others. (*Lansing v. Smith*, 8 Cow. 146.) So when the nuisance consists in maintaining a pile of wood, on the street constituting the bulkhead in front of the plaintiff's store house, injury to the rental of the store house, by reason of such nuisance, is an injury common to all other property in the neighborhood, and will not sustain a private action. (*Dougherty v. Bunting*, 1 Sandf. 1.)

But where the plaintiff declared that, before and at the time of committing the grievance, he was navigating his barges, laden with goods, along a public navigable creek, and that defendant wrongfully moored a barge across and kept the same so moored from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, whereby the plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expense in the carriage of his goods over land. It was decided that this was such a special damage as would sustain an action. (*Rose v. Miles*, 4 M. & S. 101.)

But, though the plaintiff must sustain some special injury to warrant an action, it need not be large damage. Trifling damages are sufficient, as if he be detained on his way, for the time spent in abating. (*Pierce v. Dart*, 7 Cow. 609.)

In order to sustain a private action for special damages, it must appear that the plaintiff has not contributed to the injury, by his own fault, or by the want of ordinary care. The utmost care, on the part of the constructor of

the nuisance, will not protect him, if the injury happen, without the gross carelessness on the side of the sufferer. (*Dygert v. Schenck*, 23 *Wend.* 447.) If, however, the injury be such as could not have been avoided by the exercise of ordinary care, or was wantonly caused by the defendant, it would seem that the plaintiff, though negligent, is entitled to recover. (*Bridge v. Grand Junction R. R. Co.* 3 *M. & W.* 244; *Davis v. Mann*, 10 *M. & W.* 645.)

CHAPTER XIII.

BRIDGES.

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| 1. Erection and repair. | 5. Toll bridges. |
| 2. Money, how provided for repair. | 6. Bridge companies, how incorporated. |
| 3. Where bridge is damaged or destroyed. | 7. Bridges over canals |
| 4. Bridges between adjoining towns how repaired. | |

1. ERECTION AND REPAIR.

We have already seen (*ante*, p. 9) that a public bridge common to all people is a public highway, and governed by the same principles of the common law, which apply to highways in general. The general rules as to what bridges are public highways, and as to the dedication of bridges to public use, have been before given, and need not be repeated here. (See *ante*, p. 9, *et seq.* and p. 57.)

Towns charged with repair.—By the common law of England, the duty of repairing bridges rested upon the county, where no private person or other body was specially charged with that duty. The charge was upon the whole county, because bridges were regarded as for the common good and ease of the whole county. (*Hill v. Supervisors of Livingston*, 12 N. Y. R. 52; 1 Hawk. P. C. ch. 77, § 1.) But this rule of the common law was never adopted in this State. Our statutory system has committed the care and reparation of highways, including bridges to town officers, and has introduced the primary responsibility of towns in respect to the maintenance thereof. The commissioners of highways in the several towns have the care

and superintendence of the bridges therein, and it is their duty to cause the bridges over streams intersecting highways to be kept in repair. (*Id.*)

Liability of commissioners.—The rule as to the liability of commissioners to a private action, for injuries sustained from a bridge's being out of repair, is the same as in cases of ordinary highways. Their liability in such cases has been heretofore treated of. (*Ante p.* 73.) The principle to be drawn from the cases is, that such commissioners are not liable for damages sustained from a neglect on their part to repair bridges, where they are not shown to have the needful funds to make such reparation. And even where they have such needful funds, it is thought by some of the cases, though not definitely settled, that the action cannot be maintained. In *Bartlett v. Crozier*, (17 *John.* 439,) which was an action on the case against an overseer, for damages sustained by reason of the ruinous condition of a public bridge, the court held, that the action could not be maintained—that the statute had confided the care and reparation of bridges to the commissioners, and not to the overseers; that the overseers had no concern with bridges erected over streams, except so far as they were directed generally to execute the orders of the commissioners; and that the commissioners, not the overseers, were the responsible persons in respect to the erection or repair of bridges. But the court strongly doubted whether such an action could be maintained against the commissioner; but as the point was not involved, did not decide it.

The commissioners may, however, be indicted for neglect to make the necessary repairs. (Per WRIGHT, J., in *Garlinghouse v. Jacobs*, 29 *N. Y. R.* 303, and per BEARDSLEY, J., in *Wilson v. Mayor of New York*, 1 *Denio*, 599; see also 11 *Wend.* 539.) But an indictment

against them will not lie, unless they have funds, and the indictment should aver that fact. (*People v. Adsit*, 2 Hill, 619; 4 Hill, 630.)

What bridges commissioners to repair.—All public bridges are *prima facie*, repairable by the commissioners of highways, without distinction of foot, horse, or carriage bridges, unless they can show that others are bound to repair particular bridges. But where a bridge has been erected solely for the benefit of individuals, although it may be used by the public, the persons who erect it must keep it in repair, and they are liable for any injury that may happen by reason of its being out of repair; and in case of any such injury, or in case the bridge get out of repair, the authors of it may be indicted. (*Dygert v. Schenck*, 23 Wend. 446.) The fact that the public use a bridge, does not make the town chargeable with its reparation. Thus, if a man dig a channel across a road for his own private use, and build a bridge over it, the public traveling the highway must use the bridge, for it is a part of the highway, but since the highway was as good before the building of the bridge as since, the public are not charged with the repair of the bridge. The public to become charged must derive some benefit from the bridge, which they manifestly do not, where the way was as good before the erection of the bridge as after it. (See *ante* p. 9.) But, if the bridge be built over a natural stream, and the public cross and recross thereon, and the way is improved thereby, the town should keep it in repair, although it was built for the private benefit of the builder. (*Dygert v. Schenck*, 23 Wend. 446, and see further herein, *ante* p. 9.)

Mandamus.—A mandamus will not be granted to compel commissioners to proceed to repair or erect a bridge, unless they have funds sufficient therefor.

In the *People v. Commissioners of Hudson*, (7 Wend. 474,) it appeared that a bridge over a stream had fallen down or become unsafe to pass and repass, and the relator applied for a mandamus, commanding the commissioners to rebuild the same. An alternative mandamus was issued, and the commissioners made return thereto, that the expense of building the bridge would be about \$700, and that they had no funds whatever to appropriate to that use. The court refused a peremptory mandamus, on the ground of want of funds.

Liability of towns.—The law as to the liability of towns and incorporated cities and villages, for repairs of roads, has been treated of heretofore, and is referred to as applicable to bridges. (See *ante* p. 75, *et seq.*)

Commissioners may construct new bridges.—Although the statute does not, in direct and express terms, make it the duty of highway commissioners to construct new bridges where none have been before built; yet, they have the implied power to construct such new bridges, especially such bridges as it is the duty of the towns to make and keep in repair. But, in no case, have they any power or authority to construct bridges at the expense of the town, or of the county, unless they are connected with and form a part of an existing highway. (*Mather v. Crawford*, 36 Barb. 564.)

Notice on bridge.—The commissioners of highways, of each town, may put up and maintain, in conspicuous places, at each end of any bridge in such town, maintained at the public charge, and the length of whose chord is not less than twenty-five feet, a notice with the following words in large characters: "One dollar fine for riding or driving on this bridge faster than a walk." (1 R. S. 525, § 122.)

Penalty.—Whoever shall ride or drive faster than on a walk over any bridge, upon which such notices shall have been placed, and shall then be, shall forfeit, for every offence, the sum of one dollar. (*Id.* § 123.)

Injuries to bridge.—Whoever shall injure any bridge, maintained at the public charge, shall, for every offence, forfeit treble damages. (*Id.* § 124.)

In addition to this, it is provided that every person who shall willfully or maliciously destroy any public or toll bridge, or turnpike gate, shall, upon conviction be adjudged, guilty of a misdemeanor. (2 *R. S.* 695, § 30.)

It is also declared to be *arson*, in the fourth degree, to willfully set fire to, or burn, in the day or night time, any toll bridge, or any other public bridge. (2 *R. S.* 667, § 7.)

2. MONEY, HOW PROVIDED FOR REPAIRS.

The power and duties of the commissioners of highways, in raising money for the repair of roads and bridges, have been before treated of, and the statutes relating thereto, cited at large. (*Ante p.* 88, *et seq.*)

By such statutes it is provided, that the board of supervisors are to cause to be levied, in any town, a sum not exceeding \$250 in any year, upon an estimate made for that purpose by the commissioners of highways, for the improvement of roads and bridges. (1 *R. S.* 502, § 4.) A further sum of \$250 or less, in any one year, may, upon a vote of the town, in town meeting, be raised by the board of supervisors. (*Laws* 1832, *ch.* 274.)

The supervisors have further power to cause to be levied and collected such further sum not exceeding \$500 in any one year, as a majority of the qualified voters of the town, at any legal town meeting, shall have voted to be raised upon their town. (*Laws* 1838, *ch.* 314.) And when the commissioners shall deem these sums insufficient, they

may apply, in open town meeting, for a vote authorizing such further sum, as may be necessary, not exceeding \$750, in addition to the sum now allowed by law. (*Laws* 1857, *ch.* 615.) Again, the board of supervisors in each county, are empowered to authorize any town in their county, by a vote of such town, to borrow any sum of money not exceeding \$4,000 in one year, to build or repair any roads or bridges, and prescribe the time for payment within ten years. (*Laws* 1849, *ch.* 194, § 4, *sub.* 9.) (For form of notices, &c., herein, see Appendix Nos. 12, 13.)

When built or repaired at expense of county.—It is provided by the Revised Statutes, that whenever it shall appear to the board of supervisors of any county, that any one of the towns in such county would be unreasonably burdened, by erecting or repairing any necessary bridge or bridges, in such town, such board of supervisors shall cause such sum of money to be raised and levied upon the county, as will be sufficient to defray the expenses of erecting or repairing such bridge or bridges, or such part of such expenses as they may deem proper; and such moneys, when collected, shall be paid to the commissioner of highways of the town, in which the same are to be expended. (1 *R. S.* 524, § 119.)

No board of supervisors shall, under the last preceding section, cause any sum exceeding one thousand dollars, to be levied and raised on any county in any one year. (*Id.* § 120.)

In case the commissioners of highways of any town shall be dissatisfied with the determination of the board of supervisors of their county, touching an allowance for any such bridges, such determination shall, on the application of the commissioners, be reviewed by the Court of Sessions of the same county, whose order in the premises

shall be observed by every such board of supervisors. (*Id.* § 121.)

The notice of the application should be served upon the chairman of the board of supervisors; or, in case there is none or he is absent, on the clerk of the board.

Although no time is prescribed, it is proper that the notice should be served at least ten days before the application.

The limit in the above provision prohibiting the raising in any one county more than \$1,000 in any one year, relates only to bridges which are a charge upon the *towns*. Where any bridge is a charge upon the county they have ample power to raise all necessary money to rebuild or repair it, even after they have made provision for raising and distributing the \$1,000 above provided. (*People v. Supervisors of Dutchess*, 1 *Hill*, 50.)

When money may be raised on county.—By section one of chapter 314 of the act of 1838, it is provided that the board of supervisors of each county in this State, in addition to the powers now conferred on them by law, have power, at their annual meeting or when lawfully convened at any other meeting—

1. To cause to be levied, collected and paid to the treasurer of the county, such sum of money as may be necessary to construct and repair bridges therein; and to prescribe upon what plan and in what manner the moneys so to be raised shall be expended.

2. To apportion the tax so to be raised among the several towns and wards of their county as shall seem to them to be equitable and just.

Notice of application.—The third section of the same act provided that all persons intending to apply to any board of supervisors for the imposing any tax pursuant to

the first section of the act above cited, shall cause a notice of such application to be published once in each week for four successive weeks, immediately preceding the meeting of the board of supervisors at which such application shall be made, in a newspaper printed in such county; but if no newspaper be printed in the county, then such notice shall be published in like manner in some public newspaper printed nearest thereto. (For form of notice, see Appendix No. 81.)

It was thought in *Hill v Supervisors of Livingston*, (12 *N. Y. R.* 52,) that this provision did not relate exclusively to bridges which are a charge upon the whole county, but that the only limitation of the subject in respect to which the power is to be exercised is, that the bridges be in the county. (See *People v. Supervisors of Dutchess*, 1 *Hill*, 50.)

It is also held that the section above cited requiring all persons intending to apply for the imposition of a tax to give notice, does not restrain the board from acting on their own motion in raising money for the necessary repair of county bridges.

3. WHERE BRIDGE IS DAMAGED OR DESTROYED.

By the act of 1858, (*chapter 103, as amended in 1865, chapter 442*), entitled "An act to provide for the speedy construction and repair of roads and bridges, where the same shall have been damaged or destroyed," it is provided that :

§ 1. In case any road or roads, bridge or bridges shall be damaged or destroyed by the elements or otherwise, after any town meeting shall have been held, and since the fifteenth day of February, A. D., eighteen hundred and sixty-five, then, and in that case, it shall be lawful for the commissioner or commissioners of highways, by and with the consent of the board of town auditors, or a majority thereof of the town or towns in which such road or roads,

bridge or bridges shall be situated, to cause the same to be immediately repaired or rebuilt, although the expenditures of money required may exceed the sum now authorized to be raised by law upon the taxable property of the town or towns for such purposes; and the commissioners of highways shall present the proper vouchers for the expense thereof to the town auditors, at their next annual meeting, and the said bill shall be audited by them, and the amount audited thereon shall be collected in the same manner as amounts voted at town meetings as now required. The commissioners acting under this act shall be entitled to receive, for each day's service actually rendered, two dollars.

§ 2. The board of town auditors may be convened in special session by the supervisor, or, in his absence, the town clerk, upon the written request of any commissioner of highways, and the bills and expenses incurred in the erection or repairs of any such roads or bridges, may then be presented to and audited by such board of town auditors; and the supervisor and town clerk shall issue a certificate, to be subscribed by them, setting forth the amount so audited and allowed, and in whose favor, and the nature of the work done and the material furnished; and such certificate shall bear interest from its date, and the amount thereof, with interest, shall be levied and collected in the same manner as other town expenses.

§ 3. No account for services rendered or materials furnished according to the provisions of this act, shall be allowed by such board, unless the same shall be accompanied by the affidavit of the party or parties performing such labor, or furnishing such material, nor unless the commissioner or commissioners shall certify that such service has been actually performed, and such material was actually furnished, and that the same was so performed or furnished by request of said commissioner or commission-

ers, and such board of auditors may require and take such other proof as they may deem proper, to establish any claim for such labor and material, and the value therefor.

4. BRIDGES BETWEEN ADJOINING TOWNS—HOW REPAIRED.

Whenever any two or more towns shall be liable to make or maintain any bridge or bridges, the same shall be built and maintained at the joint expense of said towns, without reference to town lines. (*Laws* 1841, *ch.* 225, § 1, *as amended* 1857, *ch.* 383, § 1.)

Commissioners to make joint contract.—For the purpose of building and maintaining such bridges, it shall be lawful for the commissioners of said towns, or of commissioners of either one or more towns respectively, the other or others refusing to act, to enter into joint contracts, and such contracts may be enforced in law or equity, against such commissioners or their representative successors, jointly or severally, respectively; and the commissioners of said towns, so liable, may be proceeded against jointly, for any neglect of duty, in reference to such bridges. (*Id.* § 2.)

In case of neglect or refusal to repair such bridges.—If the commissioners of highways, of either of such towns, after notice, in writing, from the commissioners of highways of any other of such towns, shall not, within twenty days, give their consent, in writing, to build or repair any such bridge, and shall not, within a reasonable time thereafter, do the same, it shall be lawful for the commissioners, so giving such notice, to make or repair such bridges, and then to maintain a suit at law in their official capacity, against said commissioners, so neglecting or refusing to join in such making or repairing; and in such suit the plaintiff or plaintiffs shall be entitled to recover so much

from the defendant or defendants, respectively representing said other towns, as the town or towns would be liable to contribute to the same, together with cost of suit and interest, without proving any contract; and in an action in pursuance of the act hereby amended, to recover the expenses of building or repairs, it shall not be necessary to entitle such commissioner or commissioners to recover on the trial of the above action, to prove that the defendants, or their predecessors in office were, at the time of the service of the notice above mentioned, in the possession of funds, belonging to the town which he or they represent, sufficient to make such repairs; nor shall the want of funds be any defense to the said action; and it shall be the duty of the board of supervisors of the county, in which such towns are located, to levy the amount of any judgment so obtained, with costs and interest, on the taxable property of any town, against the commissioner or commissioners of which such judgment has been so obtained, but the commissioner or commissioners of such town shall not be personally liable for such judgment. (*Id.* § 3.)

Judgment a charge on town.—Any judgment recovered against the commissioners of highways in their official capacity under the provisions of this act, shall be a charge on said town, and collected in the same manner as other town charges, except in cases where the court before which the judgment shall be recovered shall certify that the neglect or refusal of said commissioners was willful and malicious, in which case said commissioners shall be personally liable for such judgment, and the same may be enforced against them in the same manner as against individuals. (*Id.* § 4.)

Petition of freeholders.—Whenever any adjoining towns shall be liable to make or maintain any bridge over any

stream dividing such towns, whether in the same or in different counties, it shall be lawful for three freeholders in either of such towns, by a petition in writing signed by them, to apply to the commissioners of highways in each of said towns, to build, rebuild or repair such bridge, and if such commissioners refuse to build, rebuild or repair such bridge within a reasonable time, either for the want of funds or any other cause, the said freeholders, upon affidavit and notice of motion, a copy of which shall be served on each of said commissioners at least eight days before the hearing thereof, may apply to the Supreme Court at a special term thereof, to be held in a judicial district in which such bridge or any part thereof shall be located, or to a judge of said Court at Chambers, for a rule or order requiring such commissioners to build, rebuild or repair such bridge, and such court or judge upon such motion may in doubtful cases refer the matter to some disinterested person to ascertain the requisite facts in relation thereto, and to report the evidence thereof to said court or to such judge. Upon the coming in of such report in case of such reference, or upon or after the hearing of the motion, in case no such reference shall be ordered, the court or judge shall make such order thereon as the justice of the case shall require. If such motion be granted in whole or in part, whereby funds shall be needed by the said commissioners to carry said order into effect, such court or judge shall specify the amount of money required for that purpose, and how much thereof shall be raised in each town. (*Laws 1857, ch. 639, § 1.*)

Proceedings on reference.—In case a reference shall be ordered as specified in the first section of this act, the referee shall appoint a suitable time and place for taking the evidence, and shall notify one of said freeholders and the said commissioners thereof, or cause them to be notified;

he shall have power to issue subpoenas for witnesses at the instance of either party, and may compel the attendance of such witnesses, or failing to appear in obedience to such subpoena by attachment, and may punish defaulting witnesses for contempt by fine or imprisonment; he shall have power to adjourn such proceedings, from time to time, and to administer the requisite oath to witnesses before him. The referee shall report the evidence taken before him to the court or justice who made the order of reference without unnecessary delay, and shall be entitled to three dollars a day for his services, to be paid in the first instance by the said freeholders. (*Id.* § 2.)

Commissioners of adjoining towns, how compelled to join in building bridge.—The commissioners of highways, of any such town, are hereby authorized to institute and prosecute proceedings, under this act, to compel the commissioners, of such adjoining towns, to join in the building, rebuilding or repair of any such bridge, in like manner as the said freeholders are hereby authorized so to do. (*Id.* § 3.)

Plan, how fixed.—Upon the said order for building, rebuilding or repairing, such bridge being made, and a copy thereof being served on the commissioners of highways of such adjoining towns respectively, the commissioners of highways of said two towns, shall forthwith meet and fix on the plan of such bridge, or the manner of repairing such bridge, and shall cause such bridge to be built, rebuilt or repaired, out of any funds in their or either of their hands, applicable thereto; and in case no funds, or an inadequate amount thereof are on hand, then they shall cause the same to be built, rebuilt or repaired upon credit, or in part for cash, and in part upon credit, according to the exigency of the case; and the commissioners are authorized to enter into a contract, with any

contractor, for building, rebuilding or repairing such bridge, pledging the credit of each town for the payment of its appropriate share, so far as the same shall be done upon credit. (*Id.* § 4.)

Report to auditors.—The commissioners of highways, in each town, shall make a full report of their proceedings, in the premises, to the auditors of town accounts, at the time of making their annual report. The said commissioners, for each town, shall attach to the copy of the said order granted by the Supreme Court, or a judge thereof, an accurate account, under oath, of what has been done in the premises, and deliver the same to the supervisors of each town. The board of supervisors, at their annual meeting, shall levy a tax upon each of such towns, when in the same county, and upon the appropriate town when in different counties, its share of the cost of building, rebuilding or repairing such bridge, after deducting all payments actually made, by said commissioners, thereon; which tax, including prior payments, shall, in no case, exceed the amount specified in said order. (*Id.* § 5.)

Right of appeal.—Either party considering himself aggrieved by the granting or refusal to grant such order by the court at special term, or by a judge of such court, may appeal from such decision to the Supreme Court at general term, for the review of such decision. The Supreme Court, at the general term, shall have power to alter, modify, or reverse such order, with or without costs. (*Id.* § 6.)

Costs.—The Supreme Court at special term, or a judge at Chambers, shall have power to grant or refuse costs as

upon a motion, including also witnesses' fees, referees' fees and disbursements. The appeal provided for in the last section, shall conform to the practice of the Supreme Court in case of appeals from the decision of a motion at a special term, to the general term of the Supreme Court. (*Id.* § 7.)

Proceedings where such bridge has been repaired by individuals.—Whenever any such bridge shall have been, or shall be so out of repair, as to render it unsafe for travelers to pass over the same, or whenever such bridge shall have fallen down, or been swept away by a freshet or otherwise, if the commissioners of highways of such adjoining towns, after reasonable notice of such condition of such bridge, have neglected or refused, or shall neglect or refuse to repair or rebuild such bridge, then, and in such case, whatever funds have been or shall be necessarily or reasonably laid out or expended in repairing such bridge, or in rebuilding the same, by any person or persons, or by any corporation, shall be a charge upon such adjoining towns, each being liable for its just proportion; and the person or persons, or corporation, who has made such expenditure, or shall make the same, may apply to the Supreme Court at a special term, or to a judge at Chambers, for an order requiring such towns severally to reimburse such expenditures, which application shall be made upon serving papers for such application upon the commissioners of highways in each of such towns, at least eight days before such application shall be made, and such court or judge is authorized to grant an order requiring each of such adjoining towns to pay its just proportion of such expenditure, specifying the same; and in case such order shall be granted, it shall be the duty of the commissioners of highways, in each of such towns, forthwith to serve a copy of such order upon the supervisor of each

of such towns, who shall present the same to the board of supervisors at their next annual meeting. The board of supervisors shall raise the amount justly chargeable upon each town, and cause the same to be collected and paid to such person or persons, or corporation, as incurred such expenditure. The right of appeal is given to such party under this section, provided for under the sixth section of this act. (*Id.* § 8.)

5. TOLL BRIDGES.

A toll bridge may also be a highway, only differing from an ordinary public bridge in this, that the public, in consideration of the payment of certain tolls, are relieved from the responsibility of keeping it in repair.

Subject to the payment of such tolls, the rights and privileges of the public on such bridges are the same as on ordinary public bridges. (See *ante* p. 13.)

Liability for repair.—A corporation who, in pursuance of their charter, build a bridge and take tolls from passengers, thereby become bound to keep the bridge in repair. (*Townsend v. Susquehanna Turnpike Co.* 6 John. 90; *Kane v. People*, 3 Wend. 363.)

In *Townsend v. Susquehanna Turnpike Co. supra*, the action was for the value of a horse killed by the fall of defendants' bridge, it was held that the defendants were bound to bestow ordinary care and diligence in the construction of their bridges and keeping them in repair; but were not responsible for accidents which did not arise from their neglect or want of such ordinary care and skill. The plaintiff in that case had gone on to the bridge with a heavy load. There was some conflict of evidence about the sound condition of the bridge. The jury gave verdict for the plaintiff, and the court sustained it on appeal—with great reluctance—on the ground that

it was not so strongly against the evidence as to justify them in setting it aside. In *Thompson v. Matthews*, (2 *Edw.* 212,) which was an action by the plaintiffs, owners of a toll bridge, to restrain the defendant from crossing the bridge with extraordinary loads, the court said: If persons take improper loads, and the bridge has been properly constructed, then the owners of it have a remedy by a special action on the case, or in trespass for damages done; while, on the other hand, if passengers and their property should sustain an injury by a breaking from ordinary loads, the owners must respond in damages.

A toll bridge company, so long as they continue to take toll, cannot discharge themselves from liability to individuals by simply giving notice of danger. To give the notice such effect they must likewise cease to take the toll. (*Randall v. Cheshire Turnpike*, 6 *N. Hamp. R.* 147.)

Must rebuild bridge destroyed.—If a bridge be carried away by a sudden flood, the company must rebuild it within a reasonable time, regard being had to the importance of the road, the magnitude of the work, the opportunity for procuring materials, and other circumstances connected with its reconstruction. (*People v. Hillsdale, &c. Turnpike Co.* 23 *Wend.* 254.) Should the bridge remain impassable, and the business of the company be thereby stopped for the period of one year, it will amount at common law to a forfeiture of their charter; but a legal course of proceeding must be instituted to obtain judgment of ouster. (*Id.*) And where a toll bridge is out of repair, the public are not limited to the remedy of having the gates thrown open, but may proceed by information. (*Id.*) Under the act of 1848, hereafter cited, the bridge must be rebuilt within three years, or the company shall cease to be a body corporate.

Indictment.—Should a bridge company not keep their bridge in repair, they may be indicted for maintaining a nuisance; but in analogy to the rule in like cases, to authorize a conviction it is necessary to allege in the indictment, and prove on the trial, not only that the bridge has been out of repair, but also that it continues so to be, down to the time of the finding of the indictment. (*People v. Branchport, &c. Plankroad Co. 5 Park. Cr. 604.*)

Injuring or passing gate.—It is provided that every person who shall willfully break, throw down, or injure any gate erected on any bridge, erected or constructed by virtue of the act of 1848 (hereafter cited), or forcibly or fraudulently pass any such gate thereon, without having first paid the legal toll for crossing said bridge, shall for each offence forfeit to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from such wrongful act. (*Laws 1854, chap. 120.*)

Notice on toll bridge.—It shall be lawful for any corporation or individual owning a toll bridge to put up at each end thereof, in a conspicuous place, a notice in the following words: "One dollar fine for riding or driving faster than a walk on this bridge," and during the continuance of such notice any person who shall ride or drive faster than a walk on such bridge, shall forfeit the sum of one dollar, to be sued for in the name of the corporation or person or persons owning such bridge, and to be recovered with costs of suit. (*Laws 1838, chap. 262, § 2.*)

Bridges to become highways.—Whenever a corporation owning a toll bridge shall become dissolved, such bridge shall be left without waste or damage, and shall be a public highway. (*Id. § 3.*)

In such case it becomes the duty of the commissioner to keep it in repair, as in case of other bridges, and they

may be compelled so to do by mandamus, or may be indicted, provided they have the necessary funds for the repair.

6. BRIDGE COMPANIES—HOW INCORPORATED.

The following is the act of 1848, chapter 259, providing for the incorporation of bridge companies:

Corporation may be formed.—§ 1. Any number of persons not less than five, may be formed into a corporation, for the purpose of constructing and owning a bridge across any stream of water, as hereinafter provided, upon complying with the following requirements:

Articles of association.—1. They shall severally subscribe articles of association, in which shall be set forth the name of the corporation, the number of years the same is to continue, which shall not exceed fifty years; the amount of the capital stock of the corporation, which shall be divided into shares of twenty-five dollars each, the number of directors and their names, who shall manage the concerns of the corporation for the first year, and until others are elected; the location of such bridge, and the plan thereof:

2. Each subscriber to such articles of association shall subscribe thereto his name and place of residence, and the number of shares of stock taken by him in such corporation.

3. Whenever one-fourth part of the amount of the capital stock, specified in the articles of association, shall have been subscribed, and on complying with the provisions of the next section, such articles may be filed in the office of the State Engineer and Surveyor, and clerk of the county or counties in which the bridge is built; and thereupon the persons who have subscribed the articles of association

as aforesaid, and such other persons as shall become stockholders in such company, and their successors, shall be a body corporate, by the name specified in such articles of association, and shall possess the powers and privileges, and be subject to the provisions of titles three and four of chapter eighteen of the first part of the Revised Statutes, so far as those provisions are consistent with the provisions of this act.

Liability of stockholders.—§ 2. All the stockholders of every company incorporated under this act, shall be severally and individually liable, to an amount equal to the amount of the capital stock held by them respectively, to the creditors of such company, for all the debts contracted by the directors or agents of such company for its use, until the whole amount of the capital stock fixed and limited by such company is paid in, and a certificate thereof filed in the offices aforesaid, and the whole capital stock paid in, shall be one-half thereof within one year, and the other half thereof within two years from the time of the incorporation of such company, and if not so paid in, such corporation shall be dissolved. If the directors of any corporation formed under this act shall contract debts for the company, exceeding in the aggregate the amount of the capital stock, they shall be personally liable for all the debts of the corporation.

Amount to be paid before filing.—§ 3. Such articles of association shall not be filed as aforesaid, until five per cent on one-fourth of the amount of the stock of such company fixed as aforesaid shall have been actually paid in, in good faith, to the directors named in such articles of association, in cash, nor until there shall be endorsed thereon, or annexed thereto, an affidavit made by at least three of the directors named in such articles of association,

that the amount of stock required by the first section of this act to be subscribed, has been subscribed, and that five per cent on the amount has been actually paid in as aforesaid.

Copies of articles to be evidence.—§ 4. A copy of such articles of association filed in pursuance of this act, with a copy of such affidavit endorsed thereon or annexed thereto, and certified to be a copy by the proper officer, shall, in all courts and places be presumptive evidence of the facts therein contained.

Election of directors.—§ 5. The business and property of every such corporation shall be managed and conducted by a board of directors, consisting of not less than five nor more than nine, who shall be chosen, except those for the first year, at such place within a county in which the bridge of such corporation or some part thereof shall be located, as shall be prescribed by the by-laws thereof. The directors shall give notice of every such election, previous to the holding thereof, by publishing the same once in each week for four successive weeks, in a public newspaper, published in each county in which such bridge or any part thereof, shall be located, and if in any such county no such paper shall be published, such notice shall be published in some county adjoining such last mentioned county. All elections of directors shall be by ballot and by a majority of all votes given thereat; and every stockholder being a citizen of the United States and attending in person or by proxy, shall be entitled to one vote for each share of stock which he shall have owned absolutely, or as executor, administrator or guardian, for thirty days previous to such election. No person shall be a director unless he shall be a stockholder, owning at least four shares of stock, absolutely in his own right or as executor,

administrator or guardian, and entitled to vote at the election at which he shall be chosen, nor unless he shall be a citizen of this State; and a majority of the directors shall, at the time of their election, be residents of the county or counties in which such bridge shall be located. Whenever any vacancy shall happen in the board of directors, it shall be supplied until the next election by the remaining directors. The directors of every such company shall be elected in the same month in each and every year, and such election after the first, shall be held on the first Tuesday of such month, and the directors chosen at any election shall hold their offices, to and including the Tuesday next after that appointed by law for holding the election next succeeding that at which they were chosen. If an election of directors shall not be held on the day prescribed by this act for holding the same, the directors in office on that day shall hold their offices until their successors shall be elected, but after the expiration of their regular term of office as prescribed by this section, they shall be incapable of doing any act, as such directors, except such as may be necessary to give effect to an election of directors. The provisions of the second article of the second title of the eighteenth chapter of the first part of the Revised Statutes, shall apply to every corporation formed under this act, so far as such provisions shall be consistent with the provisions of this act.

Application for leave to erect bridge.—§ 6. When any bridge corporation shall be desirous of constructing a bridge or any part thereof, in any county, it shall apply to the board of supervisors of such county at the annual or any special meeting thereof, for authority to construct such bridge; of which application, such corporation shall give notice, by publishing the same in at least one public newspaper in such county, or if no newspaper is published

therein, then in an adjoining county, once in each week for six weeks successively, previous to the time of presenting such application to such board specifying such time and the location of such proposed bridge. If the place of the location of such bridge shall be situated in more than one county, such application shall be made to the board of supervisors of every such county. Such application shall also specify the length and breadth of such bridge; and the notice of such application shall set forth all the particulars required to be specified in such application. Upon the hearing of the said application, all persons residing in such county or interested in such application, may appear and be heard in respect thereto. Such board may take testimony in respect to such application, or may authorize it to be taken by a county judge or justice of the peace of such county; and it may adjourn the hearing from time to time. A copy of the articles of association of such corporation certified by the State Engineer and Surveyor, or by the clerk where such articles are filed, shall be attached to and filed with such application. No such corporation shall be authorized to bridge any stream, in any manner that will prevent or endanger the passage of any raft of forty-five feet in width, or any ark, where the same is navigated by rafts or arks.

Where the notice is given before the incorporation of the company, but the company is duly incorporated at the time of the application, the proceeding will be valid. *Laws 1852, ch. 372.*

Where the stream is navigable, or the bed of it belongs to the State, application must be made to the legislature. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. R. 44.)

Assent of board to be recorded.—§ 7. If, after hearing such application, such board shall be of opinion that the public interests will be promoted by the construction of

such bridge on the proposed site, it may, if a majority of all the members elected to such board, shall assent thereto, by an order to be entered in its minutes, authorize such company to construct such bridge, as shall have been specified in the application which shall be particularly described in such order. Such corporation shall cause a copy of such order, certified by the clerk of such board, with such application, to be recorded in the clerk's office of such county, before it shall proceed to do any act by virtue thereof; and such board shall cause such application, when it shall have finally acted on the same, to be filed at the expense of the corporation, with all the other papers relating thereto, or to the proceedings of said board thereon, in the office of the clerk of the county in which it shall have been made. Any corporation formed under this act, may use, in such manner as such board shall prescribe, so much of any public highway on either side of any stream, as may be necessary for the construction and maintenance of such bridge and toll houses.

Over streams navigated by rafts.—§ 8. In case any bridge shall be constructed, under the provisions of this act, over any stream navigable by rafts, it shall be the duty of the corporations constructing such bridge, at all times, to keep the channel of said stream, both above and below said bridge, free and clear from all deposits, in any wise prejudicial to the navigation thereof, which may be formed or occasioned by the erection of such bridge.

Penalty for delaying rafts.—§ 9. Any corporation organized under the provisions of this act, which shall construct a bridge over any stream, navigable by rafts as hereinbefore provided, shall be liable to pay all persons who may be unnecessarily or unreasonably hindered or

delayed in passing such bridge, all damages which they shall sustain thereby, to be recovered with costs of suit.

How constructed.—§ 10. Every bridge constructed by virtue of this act, shall be built with a good and substantial railing or siding, at least four and a half feet high. Whenever such bridge shall be completed, and a certificate signed by the county judge of the county in which such bridge is situated, or if such bridge shall be located in more than one county, by the county judge of each of such counties, and such certificate filed in the office of the clerk of such county, or of each of said counties, if such bridge shall be located in more than one county, that such bridge is constructed and completed in a manner safe and convenient for the public use, the directors may erect a toll-gate at such bridge, and demand and receive such sum as shall be, from time to time, prescribed by the supervisors of the county or counties where the bridge is located.

Exemptions from toll.—§ 11. No tolls shall be collected for crossing any bridge constructed by any corporation formed under this act, from any person going to or from public worship, or to or from a funeral, or to or from school, or to or from a town meeting or election, at which he is entitled to vote, for the purpose of giving such vote, and returning therefrom; or to or from a military parade which he is, by law, required to attend, or to or from any court which he shall be required to attend, as a juror or witness, or to or from his legally required work upon any public highway.

Calls on stockholders.—§ 12. The directors of any incorporation, formed under this act, may require payment from the stockholders, of the sums subscribed to the capital stock, at such times and in such proportions, and on

such conditions as they shall see fit, under the penalty of the forfeiture of their stock, and all previous payments thereon; and they shall give notice of the payments thus required, and of the place and time when and where the same are to be made, at least thirty days previous to the time fixed for the payment of the same, for the time and in the manner herein prescribed for giving notice of the election of directors, and by sending such notice to such stockholder, by mail, directed to him at his usual place of residence.

Transfer of shares.—§ 13. The shares of any corporation, formed under this act, shall be deemed personal property, and may be transferred in such manner as shall be prescribed by the by-laws of such corporation; and the directors of every such corporation may, at any time, with the consent of a majority in amount of the stockholders in such corporation, provide for such increase of the capital stock thereof, as may be necessary for the completion or reconstruction of such bridge, and the certificate of the amount of any such increase, within thirty days thereafter, shall be filed in the offices of the state engineer and surveyor, and the clerk or clerks of the county or counties in which such bridge is located, which certificate shall be authenticated by the signatures and oaths of a majority of said directors.

Taxation.—§ 14. So much of any such bridge or toll houses, constructed by virtue of this act, as shall be within any town, city or village, shall be liable to taxation in such town, city or village, as real estate.

When ceases to be a body corporate.—§ 15. Every company, incorporated under this act, shall cease to be a body corporate:

1. If, within two years from the filing of their articles of association, they shall not have commenced the construction of their bridge, and actually expended thereon at least ten per cent of the capital stock of such company; or,

2. If within five years from the filing of such articles of association such bridge shall not be completed according to the provisions of this act; or,

3. If in case the bridge of such company shall be destroyed, it shall not be reconstructed within three years thereafter.

Annual report.—§ 16. It shall be the duty of the president and secretary of every corporation formed under this act, to report annually to the State Engineer and Surveyor, and the county clerk where the papers are filed, under oath, the cost of their bridge, the amount of all money expended, the amount of their capital stock, and how much paid in, and how much actually expended, amount received during the year for tolls, and from all other sources, stating each separately, the amount of dividends made, and the amount of indebtedness of such company, specifying the object for which the indebtedness accrued; and such other particulars in respect to the business affairs of such corporation, as the said State Engineer and Surveyor, or the Legislature, or either branch thereof, require to be so reported.

Private bridges.—§ 17. When any bridge may be in process of construction by private subscriptions at the time of the passage of this act, the subscribers may organize into a corporation pursuant to the provisions of this act, with the same power and privileges as if such bridge had not been so commenced.

Subject to visitation.—§ 18. All companies formed under this act shall at all times be subject to visitation and exami-

nation by an officer or agent, in pursuance of law, or by the Legislature, or by a committee, appointed by either house thereof; and the courts of this State shall have the same jurisdiction over such corporations and their officers as over those created by special acts.

Report when to be made.—§ 19. Every report required to be made by the 16th section of this act, shall be made in the month of January in each year, and shall show in respect to the particulars required therein to be set forth, the affairs and business of the corporation, making the same at the close of the year, ending on the thirty-first day of December, next preceding the time of making the same, and shall be published in the nearest newspaper four weeks, and every corporation formed under this act, which shall neglect to make such report as thereby required, shall forfeit to the people of this State for every such neglect, the sum of two hundred dollars, and for every week such corporation shall neglect to make such report after the expiration of the time, within which it is required as aforesaid to make the same, it shall forfeit as aforesaid the further sum of fifty dollars. The State Engineer and Surveyor shall report to the attorney general every such forfeiture, by whom the same shall be sued for and recovered with costs in the name of the people; and the certificate of the said State Engineer and Surveyor of any such neglect shall be presumptive evidence thereof, and if any such river, water course or lake, now so navigable, shall hereafter be rendered navigable up stream by vessels or steamboats, power to require such bridge to be altered or removed is reserved to the Legislature.

Saving clause.—§ 20. Nothing in this act shall be construed so as to authorize the bridging of any river or water course where the tide ebbs and flows, or any water used for a harbor, any lake, river or water, which

is navigable by sail vessels or steamboats, nor the construction of any bridge within the limits prescribed by any existing law for the erection or maintenance of any other bridge.

Authority from the Legislature is necessary to erect a bridge over a navigable stream, or over one the bed of which belongs to the State. (*Fort Plain Bridge Co. v. Smith*, 30 N. Y. R. 44.)

§ 21. Any existing corporation having for its object the construction and maintenance of any bridge whose charter shall expire, may be continued as such corporation by complying with the provisions of this act, so far as the same are applicable to them, with the consent of the supervisors of the county or counties in which their bridge is located, to be obtained on application to them as hereinbefore provided.

7. BRIDGES OVER CANALS.

The provisions in relation to canal bridges will be found convenient for those officers who have the care of roads and bridges in those parts of the State intersected by canals. The following provisions will be found in 1 R. S. page 247, §§ 174, 175, 176.

§ 174. "In all cases where a new road or public highway shall be laid out by legal authority, in such direction as to cross the line of any canal, and in such manner as to require the erection of a new bridge over the canal, for the accommodation of the road, such bridge shall be so constructed and forever maintained, at the expense of the town in which it shall be situate.

§ 175. "No bridge shall be constructed across any canal, without first obtaining for the model and location thereof, the consent in writing of one of the canal commissioners, or of a superintendent of repairs, on that line of the canal which is intersected by the road.

§ 176. " Every person who shall undertake to construct or to locate such bridge without such consent, and shall proceed therein so far as to place any materials for that purpose on either bank of the canal, or on the bottom thereof, shall forfeit the sum of fifty dollars; and each of the commissioners, superintendents, or engineers, shall be authorized to remove all such materials, as soon as they are discovered, wholly without the banks of the canal."

CHAPTER XIV.

RAILROADS IN HIGHWAYS AND STREETS.

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| <ol style="list-style-type: none"> 1. When railroad may be constructed in highway. 2. Compensation to owner of fee. 3. Horse railroads in streets. 4. Over turnpikes and plankroads. 5. Remedy of owner of fee. 6. Railroads in city of New York. | <ol style="list-style-type: none"> 7. Consequential damages 8. Company to restore road. 9. Action by commissioners. 10. Cattle guards at crossings. 11. Right of public to travel with wagons &c., on street railways. 12. Company to give signal at crossings. |
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1. WHEN RAILROAD MAY BE CONSTRUCTED IN HIGHWAY.

Whenever any association or individual shall construct a railroad, upon land purchased for that purpose, on a route which shall cross any road or other public highway, it shall be lawful for the commissioners of highways, having the supervision thereof, to give a written consent that such railroad may be constructed across, or on such road or other public highway; and, thereafter, such association or individual shall be authorized to construct and use such railroad across or on such roads or other highways as the commissioners aforesaid shall have permitted; but any public highway, thus intersected or crossed by a railroad, shall be so restored to its former state as not to have impaired its usefulness. (*Laws of 1835, chap. 300.*) (For form of commissioners' consent, see Appendix, No. 18.)

By order of court—By subdivision five, section twenty-eight, of chapter 140, of the Laws of 1850, railroad companies are authorized to construct their road across, along or upon any street, highway, plankroad, etc., which the route of its road shall intersect or touch; but the com-

pany shall restore the street, highway, plankroad, etc., thus intersected or touched, to its former state, or to such state as not necessarily to have impaired its usefulness. But nothing in the act is to be construed to authorize the construction of any railroad not already located in, upon or across any street, &c., in a city, without the assent of the corporation of such city. Nor to authorize any such railroad company to construct its road upon and along any highway, without the order of the Supreme Court of the judicial district in which said highway is situated, made at a special term of said court, after, at least, ten days' notice, in writing, of the intention to make application for said order, shall have been given to the commissioners of highways of the town in which said highway is situated. (*As amended by chap. 582, Laws of 1864.*)

Use thereof relates only to public interest.—The power above conferred on a railroad company to enter upon and occupy a public highway, after having obtained the consent of the commissioners or an order of the court, relates only to the public property in the road, and confers the right as far only as the public easement is concerned, leaving the companies to deal with the private rights of individuals in the ordinary mode. The statutes effectually protect the company, if they comply with the conditions, from an indictment, or against any interference with their works as a public nuisance, on account of their occupation of the highway, but not against claims for private damages arising from the use and occupation of the highway. (*Fletcher v. Auburn &c. R. R. Co.* 25 *Wend.* 462; *Robinson v. N. Y. & Erie R. R. Co.* 27 *Barb.* 512; *Williams v. N. Y. Central R. R. Co.* 16 *N. Y. R.* 97.)

2. COMPENSATION TO OWNER OF FEE.

We have already seen in chapter II, of this work, that an owner of lands is not divested of the fee of the land

by the laying out of a highway across it, and that the public do not acquire any greater interest therein than a right of way, and the powers and privileges incident to that right of way, and that subject to this easement, and this only, the rights and interests of the owners of the fee remain unimpaired. It is quite clear, therefore, that the above statutory provisions do not authorize a company to enter upon and appropriate a highway, without first obtaining the consent of the owner of the fee, or making a just compensation therefor. Nor has the Legislature power to authorize such company to enter upon and appropriate a highway, for purposes other than those to which it has been originally dedicated or laid out, in pursuance of the highway act, without first providing a just compensation therefor. (*Williams v. N. Y. Central R. R. Co.* 16 *N. Y. R.* 97.)

It must be regarded, as fully settled in this State, that the occupation of a street or highway, by a railroad, imposes an additional burden on it, essentially different from the original object of a highway, and entitles the owner of the fee to additional compensation. (*Second Presbyterian Society v. Auburn &c. R. R. Co.* 3 *Hill*, 567; *Mahon v. N. Y. Central R. R. Co.* 24 *N. Y. R.* 658; *Wager v. Troy Union R. R. Co.* 25 *N. Y. R.* 526.) And the rule is the same, whether it be a street in a city, or a common highway in the country, except in the city of New York, where the fee of most of the streets is said to be in the corporation. (*Id.*) (*Wager v. Troy Union R. R. Co. supra*; see *People v. Kerr*, 27 *N. Y. R.* 194.)

The case of *Williams v. N. Y. Central Railroad Co.* above cited, is a leading and controlling authority on this subject. The plaintiff in that case had dedicated certain lands to the public use as a street in the city of Syracuse, but was the owner of the fee of such street as well as of lots fronting thereon. The defendants had, under author-

ity of the Legislature, and express consent of the municipal authorities of the city of Syracuse, constructed their railroad upon and along such street, without having acquired the consent of the plaintiff, or having made compensation therefor. It was distinctly held that to occupy a street or highway with railroad tracks, and to use it for railroad purposes is to charge it with a new easement, not within the purposes, intent and legal effect of its dedication as a street or highway to the public ; and that consequently a railroad cannot be built upon a highway without compensation to the owner of the fee. The learned judge who delivered the controlling opinion, examined and explained the various cases in this and other States which seem to hold a contrary doctrine, and showed that nothing which was necessarily decided in any of them was in conflict with his own opinion.

The opinion of the court in the above case, is in perfect accordance with, and to a great extent based upon the case of *Davies v. Mayor, &c. of New York*, (14 N. Y. R. 506,) and the case of *The Presbyterian Society, of Waterloo v. Auburn, &c. R. R. Co.* (3 Hill, 567.) In the latter case the declaration was in trespass for entering upon the plaintiff's premises, digging up the soil, and constructing their railroad track upon it. The defense was that the *locus in quo* was a public highway, and that the charter of the company expressly authorized it to construct its road upon and across any highway. The point was therefore presented in the most direct manner possible, and the defense was most emphatically overruled. The language of Chief Justice NELSON is most pertinent and forcible. He says: "but the plaintiffs were not divested of the fee of the land by the laying out of a highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right; such as digging the soil and using the timber and other

materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the same—subject to this easement, and this only, the rights and interests of the owner of the fee remained unimpaired. It is quite clear, therefore, even if the true construction of the eleventh section accords with the view taken by the counsel for the defendants, that the Legislature *had no power* to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated, in pursuance of the highway act, without first providing a just compensation therefor."

/ The same views are reiterated in *Mahon v. New York Central R. R. Co.* (24 N. Y. R. 658; *Wager v. Troy Union R. R. Co.* 25 N. Y. R. 526; *Carpenter v. The Oswego, &c. R. R. Co.* 24 N. Y. R. 655; *Craig v. Rochester City, &c. R. R. Co.* 39 Barb. 494.)

In *Wager v. Troy Union R. R. Co.* (*supra*), the complaint was, that the defendants had entered upon and unlawfully withheld the possession of a street in the city of Troy, which was part of the plaintiff's land, subject only to the public easement. The defendants had, under authority from the Legislature, and the assent of the municipal authorities of the city, constructed their road on said street without the consent of or compensation to the plaintiff. The court decided, very emphatically, that the use of a street for a railroad is a new burden beyond the public easement, which cannot be imposed by legislative authority, without compensation to the owner of the fee; that such use, without acquiring the title of the owner of the fee, or his license, is a continuing trespass, and that such owner may maintain ejectment to recover the land, subject to the public easement as a highway.

3. HORSE RAILROADS IN STREETS.

The ground is taken by EMOTT, J., who delivered an opinion in *People v. Kerr*, (27 N. Y. R. 188,) that there is a difference in respect to property subject to an urban servitude between a city railroad and an ordinary railway running from one town to another, and that the use of a street for a horse railroad approximates more closely to ordinary highways, and is consistent with the original dedication of such street.

The remarks of the learned judge were, however, wholly *obiter*, as the point was not involved in the case, and was not passed upon by the court; the judges concurring upon the grounds stated by WRIGHT, J., in whose opinion the question was not alluded to.

The distinction between horse railroads and those on which steam is the motive power, is not made by any of the cases in the Court of Appeals before cited, but is expressly denied by some of them, and is in conflict with the reasoning and principle of all of them. Thus, in *Wager v. Troy Union R. R. Co.* the court says: "It is true that the actual use of the street by the railroad may not be so absolute and constant as to exclude the public also from its use. With a single track, and particularly if the cars used upon it were propelled by horse power, the interruption of the public easement in the street might be very trifling, and of no practical consequence to the public at large. But this consideration cannot affect the question of right of property, or of the increase of the burden upon the soil. It would present, simply, a question of degree in respect to the enlargement of the easement, and would not affect the principle, that the use of a street for the purpose of a railroad imposed upon it a new burden."

Even Mr. Justice SOUTHERLAND, who delivered a dissenting opinion, repudiated any such distinction. He

says: "In this case the railroad, I assume, was intended to be, and was operated by steam. I cannot see how that affects the question of power, although it is plain, that in a city, a road operated by steam would probably occasion much more serious consequential damages to the adjoining lot owners or occupiers than a horse railroad."

The precise question came before the Supreme Court at general term, in *Craig v. Rochester City &c. R. R. Co.* (39 Barb. 494), and the court unanimously held, that there was no distinction in this respect between railroads on which the cars are moved by animals, and those on which the motive power is steam. In this case, Mr. Justice JOHNSON says: "Nothing can be clearer than that the burthen which the Court of Appeals has declared to be an addition to that of an easement of a highway, and a taking of private property within the meaning of the provisions of the constitution before referred to, does not consist in the particular force by which the carriage is drawn along the streets. Every one must see that simply propelling the carriage along the street, whether by horses or mules or steam, or any other mechanical contrivance, would be simply exercising the right of passage over the highway, and no other or different right. But the new and additional servitude or burthen, which constitutes the taking or appropriation, consists principally, if not entirely, in the use and occupation of the soil of the street, in laying down and maintaining thereon the permanent structure upon which alone the principal business of the corporation is to be carried on, as the cases unmistakeably show. This is a permanent and exclusive right and occupancy, which no other corporation or person can enjoy in common with the defendant, without its permission."

Mr. Justice SMITH, who also delivered an opinion in this case, says: "It is claimed, however, on the part of the defendants, that the cases above cited relate exclusively

to railroads operated by steam, and have no application to railroads upon which horses only are used as a motive power; and this claim presents the precise question to be determined in this case. In support of it, the defendant insists, that there is an essential difference in the nature of the two classes of roads, not merely in respect to the motive power employed upon them, but also as to their mode of construction; the steam road being so built as that it is impracticable to drive a vehicle along or upon its track, while, as is asserted, the track of a horse railroad is not only so laid that the public can use it with ordinary vehicles, but the law secures to the public the right to such use. In my judgment, the distinction adverted to presents no substantial difference between the two classes of roads, in respect to the question in litigation, and both classes are within the principal of the cases above cited."

4. OVER TURNPIKES AND PLANK ROADS.

Where land has been taken for a turnpike and afterwards transferred by legislative authority to a railroad company, without compensation by the latter to the owner of the fee, he may maintain an action for damages resulting from such occupation. (*Mahon v. New York Central R. R. Co.* 24 *N. Y. R.* 658.) So the statute permitting a railroad to construct its road over or along a plank road or turnpike does not preclude such plank road or turnpike from recovering of the railroad all damages sustained by it, the company having entered upon the plank road or turnpike without causing damages to be assessed under the statute. (*Ellicottville Plank Road v. Buffalo &c. Railroad*, 20 *Barb.* 644; *Seneca Road Co. v. Auburn &c. R. R. Co.* 5 *Hill*, 170.)

5. REMEDY OF OWNER OF FEE.

Where a railroad company enters upon and takes possession of a highway without making compensation to the

owner of the fee, he may maintain an action of ejectment against such company. (*Carpenter v. Oswego &c. R. R. Co.* 24 *N. Y. R.* 655; *Wager v. Troy Union R. R. Co.* 25 *N. Y. R.* 526; *Lazier v. N. Y. Central R. R. Co.* 42 *Barb.* 465.) An action for trespass or for damages will also lie. (*Presbyterian Church v. Auburn &c. R. R. Co.* 3 *Hill*, 567; *Adams v. Saratoga &c. R. R.* 11 *Barb.* 454.) An injunction will also be granted in a proper case. (See *Thomp. Pro. Rem.* 245.)

6. RAILROADS IN CITY OF NEW YORK.

In the city of New York it is held that the fee of most of the streets is in the city, in trust for the public use of all the people of the State, and is under the unqualified control of the Legislature, and that, therefore, any appropriation of them to a public use—as for a railroad—by legislative authority is not a taking of private property so as to require compensation to the city or to adjoining proprietors. (*People v. Kerr*, 27 *N. Y. R.* 188.) But the corporate authorities of the city of New York have no power to confer upon individuals, by contract, for an indefinite period, the franchise of constructing and operating a railroad in the public streets for their private advantage. Their power in respect to the control and regulation of the streets is held in trust for the public benefit, and cannot be abrogated nor delegated to private individuals. So that a resolution of the common council authorizing private persons to construct and operate a railroad upon certain conditions, without limitation as to time, or reserving a power of revocation, is void because it would deprive the corporation of the power to control and regulate the use of the streets. (*Milbau v. Sharp*, 27 *N. Y. R.* 611; *Davis v. Mayor of New York*, 14 *N. Y. R.* 506.) Nor can the common council of the city of New York authorize the extension of a railroad in that city irrespec-

tive of any legislative grant, except, perhaps, when it may be necessary to the enjoyment of the principal legal grant. (*People v. Third Avenue R. R. Co.* 30 How. 121.)

7. CONSEQUENTIAL DAMAGES.

In the case of *Fletcher v. The Auburn and Syracuse Railroad Co.* (25 Wend. 462,) the court held that an action lay by an owner of land against a railroad company, if in the construction of their road upon or across a public highway they raised an embankment by which the owner of the land was obstructed in passing to and from the road, and his property was otherwise rendered less valuable, notwithstanding the charter of the company authorized the entry upon and use of such public highway; and that the license related only to the road, and left the company liable to consequential damages sustained by individuals. This case was cited and approved by Chief Justice DENIO, in *Davis v. The Mayor of New York*, (14 N. Y. R. 521,) also by DENIO, J. in *Brown v. Cayuga, &c. R. R. Co.* (12 N. Y. R. 487,) and in *Robinson v. N. Y. & Erie R. R. Co.* (27 Barb. 520.)

But in *Chapman v. The Albany and Schenectady R. R. Co.* (10 Barb. 478,) where a railroad by authority of the Legislature and of the city authorities, laid its railroad upon a street, after an alteration of its grade for the purpose, it was held that the adjoining owners could not maintain an action for special damages against the railroad, and that, the assessment for damages having been made under the charter, by the city, upon the raising of the grade, all the damages produced by it were included in it. See also *Radcliffe v. Mayor of Brooklyn*, (4 N. Y. R. 195); *Plant v. Long Island R. R. Co.* (10 Barb. 26.) So in *Gould v. Hudson R. R. Co.* (6 N. Y. R. 522), it was held that the owner of lands adjoining a navigable river, in which the tide ebbs and flows, has no private rights or

property in the water of the river, or in the shore between high and low water-mark, and is therefore not entitled to compensation from a railroad company, which constructs, in pursuance of a grant from the Legislature, a railroad along the shore between high and low water marks, so as to cut off all communication between such land and the river otherwise than across such road.

8. COMPANY TO RESTORE ROAD.

As one of the conditions of the authority to railroads to lay their road along streets, highways, plank roads, &c., they are required "to restore such road to its former state, or to such state as not necessarily to have impaired its usefulness." If they alter, change or affect the highway they must restore it to its former state, so that the rights of third persons be in no way affected injuriously by such change, or they will be responsible in damages for any injury sustained from such omission. (*Robinson v. New York & Erie R. R. Co.* 27 Barb. 512.)

This case was an action against a railroad company to recover damages for injuries to the plaintiff's land and buildings arising from the overflowing of a stream caused by the acts of the defendant; it appeared that the defendant had, in constructing its road, excavated and removed the banks of the natural stream in order to conform the ground to the grade of the railroad; the provision allowing such company to cross streams required it to restore them to their former state, the same as is provided in case of highways; and the court held that it was proper for the judge to charge the jury that if they should find from the evidence, that the injury and damage to the plaintiff was occasioned by such excavation and removal, and that but for such excavation and removal the injury and damage would not have occurred, the defendant was liable. So it was held in *Brown v. The Cayuga &c. R. R. Co.* (12

N. Y. R. 486,) that a railroad corporation, although authorized by the Legislature to construct its road across a stream, if done in such a manner as not to impair its usefulness, is liable for damages done to lands not situate upon the stream by an overflow of its water caused by the construction of the road over the stream and through its banks.

Where the charter of a railroad company required them to purchase a turnpike road running parallel to the proposed railroad, and to assume the liabilities of that corporation, before they should be permitted to run cars upon their own road and gave them the right to lay their railroad track across and along the bed of the turnpike, but required them to restore the road to its former state, or in a sufficient manner not to impair its usefulness, and the company, by virtue of these provisions, laid the track of the road by the side of the turnpike road for some distance; it was held, that if the proximity of the railroad to the turnpike rendered it dangerous to persons traveling with teams on the latter, it was the duty of the defendants to protect them against that danger, and, if such protection could not be afforded by a fence or screen, to remove the tracks of their respective roads at a greater distance from each other. (*Moshier v. Utica &c. R. R. Co.* 8 *Barb.* 427.)

9. ACTION BY COMMISSIONERS.

The commissioner or commissioners of highways in each of the towns of this State are hereby empowered to bring any action against any railroad corporation, that may be necessary or proper to sustain the rights of the public in and to any highway in such town, and to enforce the performance of any duty enjoined upon any railroad corporation in relation to any highway in the town of which they are commissioners, and to maintain an action for damages or expenses which any town may sustain or may have

sustained, or may be put to, or may have been put to, in consequence of any act or omission of any such corporation in violation of any law in relation to such highway. (*Laws 1855, ch. 255.*) (As to form of action, &c., see *ante p. 96.*)

But where a railroad company constructs their road across a highway, injuring the highway, and neglecting to restore it to its former state of usefulness, such company is liable in an action by the commissioners of highways both to damages under the general railroad act requiring crossings to be constructed without injury to the road, and also to treble damages, under 1 *Revised Statutes*, 526, § 130, respecting injuries to highways. (*Sipperly v. Troy & Boston Railroad Co.* 9 *How.* 83.)

10. CATTLE GUARDS AT CROSSINGS.

By the statute railroad companies are required to construct and maintain cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad; and it is declared, that until such cattle guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engineers, to cattle, horses or other animals thereon. (*Laws 1850, ch. 140.*)

When a railroad corporation has constructed and maintain proper fences and cattle guards, as required by statute, its absolute liability for damages to cattle upon its track ceases; and, though guilty of negligence in keeping the cattle guards effective, it is not responsible to the owner of cattle who is himself chargeable with negligence in allowing them to get upon the track; thus, where the corporation was negligent in not removing snow which filled up the cattle guards, so that they made no substantial impediment to the passage of cattle. The owner of cattle escaping from a yard on to the track under such

circumstances is chargeable with negligence and cannot recover for an injury, though guilty of no actual carelessness in suffering them to escape. But it is otherwise, if the cattle, being lawfully driven along the highway make their way on to the track in consequence of the neglect of the railroad company in not clearing its cattle guards of snow. (*Hance v. Cayuga &c. R. R. Co.* 26 N. Y. R. 428.)

When a railroad corporation neglects to maintain fences and cattle guards along its road, as required by the general railroad act, and cattle get upon the track and are injured by its engines or cars, the corporation is liable to the owner in damages, although he is not an adjoining proprietor, and it does not appear how or whence the cattle came upon the road.

A railroad corporation which omits to comply with the statutes, as to erecting and maintaining fences and cattle guards, is liable to the owner of cattle which stray upon the track from an adjoining close, or the highway crossing it, and are there injured by the engines of the company, although they were not lawfully in such close or highway. In such a case, the mere negligence of the owner in permitting his cattle to stray upon the land of another, adjoining the railroad, or to run at large in the highway which crosses it, is not a defence to the corporation. The duty imposed, by the statute, upon railroad corporations is not limited to the maintenance of fences and cattle guards, as against the animals of adjoining occupants, or those lawfully in the highway. (*Corwin v. N. Y. & Erie R. R. Co.* 13 N. Y. R. 42.)

In *Faccett v. The York and North Midland Railway Co.* (2 Eng. Law and Equity R. 289,) the plaintiff's horses, being in the highway, passed through an open gate on to the railway and were killed. By the railway act, it was made the duty of the railway company to erect gates across the highways at the crossings of the railway,

and to keep them constantly closed, except, &c. It was insisted, by the defendant, that the horses were not lawfully in the highway, and that, therefore, the company was not bound to keep the gate closed against them; but it was held that the company was liable. The duty of erecting gates and keeping them closed was imposed upon the railway company, and as to them, the court would not inquire how the horses came into the highway; but as to the company, held, that the horses were lawfully on the highway.

In villages and cities.—The statute, requiring corporations to maintain cattle guards at road crossings, applies as well to streets which are crossed by railroads in villages as in country highways. However, where a village street crosses a railroad running along another street, the corporation is not to construct cattle guards longitudinally along its track, so as to impede the passage along the street crossing it. (*Brace v. N. Y. Central R. R.* 27 *N. Y. R.* 269.)

At farm crossing.—But the act does not require cattle guards to be constructed at farm crossings. (*Brooks v. N. Y. & Erie R. R. Co.* 13 *Barb.* 594.)

Company to maintain.—A railroad company, in order to secure protection, under the statute, from liabilities for damages to animals on its track, must not only erect but *maintain* the fences and cattle guards required by the statute. (*McDowell v. N. Y. Central R. R. Co.* 37 *Barb.* 195.)

11. RIGHT OF PUBLIC TO TRAVEL WITH WAGONS, &c., ON STREET RAILWAY.

Where a horse railroad is laid upon and along the streets of a city, the public have a right to travel thereon

with horses and wagons. (*Fettritch v. Dickenson*, 22 How. 248.) But they are required to exercise greater dilligence than if upon the common pavement, and if collision ensues by the negligence of one driving on the track, he cannot recover for injuries sustained, even if the company is also at fault. (*Wilbrand v. Eighth Avenue R. R. Co.* 3 Bosw. 314.) No one but the company, however, has a right to use the road with rail cars or carriages, for the transit of passengers. (*Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.* 32 Barb. 358.)

12. COMPANY TO GIVE SIGNALS AT CROSSINGS.

A bell shall be placed on each locomotive engine run on any railroad, and rung at the distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street on the same level with the railroad, and be kept ringing until it shall have crossed such road or street, or a steam whistle shall be attached to each locomotive engine and be sounded at least eighty rods from the place where the railroad shall cross any such traveled public road or street upon the same level with the railroad, except in cities, and be sounded at intervals until it shall have crossed such road or street, and every neglect to comply with the foregoing provisions shall subject the corporation owning the railroad, to a fine not exceeding twenty dollars, in the discretion of the court having cognizance of the offence; and every engineer having charge of the engine, for every neglect to comply with the requirements aforesaid, shall be fined not exceeding fifty dollars, or imprisonment in the county jail not exceeding sixty days, in the discretion of the court before which any indictment may be tried; and the said corporation shall, moreover, be liable for all damages which shall be sustained by any person by reason of any such neglect. (*Laws 1854, ch. 282, § 7.*)

The omission by a railroad company to give the signals required by the statute on the approach of a locomotive, within eighty rods of a highway crossing is a breach of duty to the passengers, whose safety it imperils, and to the wayfarer, whom it exposes to mutilation and death. The omission of the customary signals is an assurance by the company to the traveler, that no engine is approaching from either side within eighty rods of the crossing; and he may rely on such assurance, without incurring the imputation of breach of duty to a wrong doer. But when the usual warning is withheld the wayfarer has a right to assume that the crossing is safe, and that the company is not violating the law, and endangering human life, by running an engine *without signals*.

The citizen, on the public highway, is bound only to the exercise of ordinary care; and when he is injured by the negligence of a railroad company, it is no answer to his claim for redress, that notwithstanding the omission of the signals, he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the statute, instead of relying upon its observance. (*Ernst v. Hudson River R. R.* 35 N. Y. R. 9.)

CHAPTER XV.

SIDEWALKS.

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| 1. Who may make sidewalks. | | 3. To remove snow. |
| 2. Duty of corporation to repair. | | |

1. WHO MAY MAKE SIDEWALKS.

The commissioners of highways of the several towns are authorized to expend a part of the highway tax levied in their road districts upon the sidewalks therein, and in planting shade trees upon the public greens or squares in their town, provided the roads are always kept in good repair. (*Laws of 1860, ch. 61, § 3.*)

It shall be lawful for any person owning or occupying lands adjoining a highway or road, to construct a sidewalk within said highway or road along the line of such land, and when a sidewalk shall be or has been constructed, every person who shall ride or drive a horse or team upon it, except for legitimately crossing the same, shall forfeit not less than two nor more than five dollars for each offence, in the discretion of the court, one half to the use of the owner or occupant, and the other half to the path-master of the road district, to be expended in the improvement of sidewalks therein, to be recovered in any court having cognizance thereof, with costs of suit. (*Laws of 1860, chap. 61, § 1.*)

Whenever any owner or occupant of any such land, shall refuse or neglect to prosecute for the forfeiture incurred by such trespass, it shall be lawful for any other party or person owning or occupying lands adjoining any continued portion of said sidewalk, wherein such trespass

was committed, and interested as a user thereof, to prosecute in his name, the person or persons so incurring such forfeiture, the proceeds of which shall go, one-half to the prosecutor, for his trouble and expense, and the other half for the improvement of sidewalks, as in section first. (*Id.* § 2.)

This act shall not be so construed as to diminish in any way, or interfere with the authority of commissioners or overseers of highways, or any other authority legally exercised over highways or roads; but the said commissioners of highways, of the several towns in this State, are hereby authorized to expend a part of the highway tax, levied in their road district, upon the sidewalks therein, and in planting shade trees upon the public greens or squares in said town, provided the roads are always kept in good repair. (*Id.* § 3.)

All persons owning lands fronting upon any highway (except in cities and incorporated villages), may make and have sidewalks along such land in the highway, and plant and have shade trees along the roadside of such sidewalk; such sidewalk, with shade trees, shall not extend more than six feet in width from the outward line of such highway, provided such highway is not over three rods wide, with the right to add one additional foot in width to such sidewalk, for every additional rod in width of said highway, where such sidewalks may or shall be built, or shade trees planted; and for the protection of such walks or trees, may also construct a railing upon the roadside adjacent, and within two and a half feet of such trees or walks, of not more than one bar in height, with posts; and, also, protection at the ends, in such way or manner as not to prevent foot passengers from using such walks, but so built as may and shall prevent cattle from going thereon. (*Laws of 1863, ch. 93, § 1.*)

2. DUTY OF CORPORATION TO REPAIR.

In cities, sidewalks are considered a part of the public streets, and, as such, are to be kept, like the streets themselves, in a safe and convenient state of repair, through their entire width. And this obligation is not varied or discharged by the exercise of the right of an adjoining owner of land, to use the street or sidewalk for some private purpose, not inconsistent with the right of the public. Thus, the owner of adjoining land may build thereon and construct his cellar in such a way, that the doors, windows and passage ways communicate with the street, through appertures opening in the sidewalks; but it is, nevertheless, the duty of the city to guard against the danger which might result therefrom.

And the fact that similar appertures have existed for a long time, and to a great extent in the same city, would not authorize the jury to find them, not such defects as would charge the city, if they in reality cause the sidewalk to be *dangerous*, though it might be admissible as evidence tending to prove that they were not unsafe nor inconvenient. In the case of *Bacon v. The City of Boston*, (3 *Cush.* 174), where there was an aperture thirty-seven inches long and fourteen inches in width for a cellar window, made in a sidewalk six and a half feet wide, which the plaintiff stepped into and injured his ankle, the court said: "It is true that when a road of suitable width is made and kept in a proper state of repair, and guarded with proper barriers, to protect travelers using the same, if a traveler voluntarily leaves the made road or usually traveled path, and thereby encounters pitfalls or obstructions, endangering his person or his property, he can have no remedy against the town for an injury thus received without the limits of the traveled way. But the case supposed is not one of city travel. The law as to the extent of repair and what will constitute obstructions,

rendering a public way unsafe or inconvenient for the traveler, must depend in a good degree upon the locality of the road. In the present case, the entire sidewalk was only six and a half feet in width. A sidewalk of this width in the city of Boston, should be, for its whole extent, so constructed and fitted for use as to be safe for all persons passing over it." So, an awning projecting over a sidewalk, though built by the owner of the building to which it is attached, is a defect for which the town or city is liable, if through decay, insecurity or other cause, it is dangerous to travelers. (*Drake v. City of Lowell*, 13 Met. 292; *Brady v. City of Lowell*, 3 Cush. 121; *City of Providence v. Clapp*, 17 How. (U. S.) 161.)

The sidewalk is a part of the public street designed for the use of those who travel on foot, and though the corporation may impose upon the owners of lots fronting upon the streets or avenues, the burden of paving and keeping the sidewalks in repair, they do not thereby relieve themselves of the duty imposed upon them, to keep in repair the streets and highways within the city; where such duty is imposed upon them by their charter or by statute. And if they suffer a part of the public highway to remain out of repair in so exposed and dangerous a state, that a passenger, without any negligence on his part, drops at night into a pitfall in the sidewalk, and is injured, they must answer to the injured party for the damages occasioned by their negligence. (*Wallace v. Mayor of New York*, 18 How. 169.) And the plaintiff is not bound to prove notice to the defendants of the defect or want of reparation. (*Davenport v. Ruckman*, 16 Abb. 341.)

A contrary doctrine was attempted to be established in the case of *McGinity v. Mayor of New York*, (5 Duer, 674), where it was held by Mr. Justice DUER that the city municipal incorporation was not liable for damages sus-

tained in consequence of a defective grading over area in a sidewalk, unless notice to the defendant of the defect or negligence of duty in not ascertaining and remedying it was shown. The decision of the learned judge was not fortified by any authorities, and must be regarded as overruled by the case of *Davenport v. Ruckman*, above cited.

It has been held that where no absolute and imperative duty is imposed upon a municipal corporation, by its charter, to make or repair sidewalks in the streets, or to cause them to be made and repaired, such corporation is not liable, in damages to an individual, for injuries sustained in consequence of the defective condition of the sidewalks, and that there is a distinction between the power of municipal corporations over the carriage ways of their streets, and that which they possess over sidewalks. (*Cole v. Trustees of Medina*, 27 Barb. 218; *Peck v. Village of Batavia*, 32 Barb. 634; *Hart v. City of Brooklyn*, 36 Barb. 226.) These decisions were questioned, however, in *Hyatt v. Trustees of Rondout* (44 Barb. 393; see, also, *Davenport v. Ruckman*, 16 Abb. 345.)

3. TO REMOVE SNOW.

The general duty of towns to keep their highways safe and convenient, extends as well to defects and obstructions occasioned by falls and drifts of snow, as by any other cause. (*Locker v. Brookline*, 13 Pick. 346; *Green v. Danby*, 12 Vt. 338.) The liability of towns for this species of obstruction, was very thoroughly discussed and expounded in the case of *The City of Providence v. Clapp*, (*supra*), decided in the Supreme Court of the United States. In that case the obstruction consisted of a ridge of hard-trodden snow and ice on the center of the sidewalk, along which the plaintiff was passing in the night time, and by means of which he fell across the ridge,

breaking his thigh bone in an oblique direction. In addition to the usual obligation imposed, the statute, under which the action was brought, specially directed, that when the highways were blocked up or incumbered with snow, so much thereof should be removed or trodden down, as would render the road passable. In view of this provision it was contended, that the towns and cities were bound only to keep their highways and streets open, in case of falls of snow, so as to be passable for travelers, and not to keep them from being slippery from ice or trodden down snow. But the court were of the opinion that the liability of the city was not modified by this special provision; that when a fall of snow took place, it was the duty of the city to use ordinary care and diligence to restore it to a reasonably safe and convenient state; that the law did not prescribe how this should be done, whether by treading down or removing the snow; and that it was for the jury to find, as matter of fact, whether the sidewalk, at the time in question, was in a reasonably safe and convenient state, having reference to its uses. And it was also held, that in determining this question the jury might take into consideration the ordinances of the city, not as prescribing a binding rule but as evidence that a removal, and not a treading down of the snow, was reasonably necessary.

"The powers of the towns and of the city," said Mr. Justice NELSON, in delivering the opinion of the court, "are as ample for the purpose of removing obstructions from the highways, streets and sidewalks, arising from falls of snow and accumulation of ice, as those arising from any other cause; and the reason for the removal, so that they may be safe and convenient for travelers, is the same in the one case as in the others. The 13th section of the act which gives the personal remedy, makes no distinction in the two cases; and, in the absence of some plain

distinction pointed out by the statute, it would be exceedingly difficult, if not impossible to state one. It is conceded, that an obstruction from falls of snow or accumulations of ice must be removed by the towns and cities, so as to make the highways and streets passable, and that this is a duty expressly enjoined upon them. The question is what sort of removal will satisfy the requirements of the statutes? It is admitted, that, as it respects every other species of obstruction the repairs must be such that the highways and streets may be safe and convenient for travelers; and that this is a question of fact to be determined by the jury. Is an obstruction by snow or ice to be determined by any other rule or by any other tribunal? The counsel for the defendant suggests, that as it respects such safety and convenience for travelers, in case of falls of snow, the statute should be construed as meaning merely, that the snow should be trodden down or removed, so that the highways and streets should not be so blocked up and incumbered as not to be safely and conveniently open and passable. But it is quite clear that this would be a very very indefinite and uncertain rule to guide either the officers, whose duty it is to remove these obstructions, or the jury in the passing upon them, when the subject of legal proceedings. The suggestion may be very well as an argument to the jury, for the purpose of satisfying them that the repairs in the manner mentioned, were such as to fulfill the requirements of the statute, but to lay it down as a rule of law, in the terms stated, might in many cases, and under the circumstances fall far short of it.

“The treading down of snow when it falls in great depth, or in case of drifts, so that the highway or street shall not be blocked up or incumbered, may, in some sense, and for the time being, have the effect to remove the obstructions; but as it respects the sidewalks and their uses, this remedy would be, at best, temporary; and in

case of rains or extreme changes of weather, would have the effect to increase rather than remove it. It is but common observation and knowledge of those familiar with the climate of our northern latitudes, that not unfrequently the most serious obstructions arise from the great depth of snow and changes in the temperature of the weather; and that simply treading down the snow, and leaving it in that condition without further attention, would have the effect to render the highways and sidewalks utterly impassable. In the case also of obstruction from snow, the sidewalks may frequently require its removal so as to make a safe and convenient passage for the pedestrian, when, at the same time the treading of it down in the street would answer the purpose for the traveler with his team. The nature and extent of the repairs must necessarily depend upon their location and uses; those thronged with travelers may require much greater attention than others less frequented. The just rule of responsibility, and the one, we think, prescribed by the statute, whether the obstruction be by snow or by any other material, is the removal or abatement, so as to render the highway, street or sidewalk, at all times, safe and convenient, regard being had to its locality and uses."

CHAPTER XVI.

TRAVEL UPON HIGHWAYS.

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| 1. Law of the road | 4. Running horses prohibited. |
| 2. Travelers on foot. | 5. Concerning drunken drivers. |
| 3. Where highway is impassable. | |

1. LAW OF THE ROAD.

Whenever any persons traveling with any carriages shall meet on any turnpike road or public highway in the State, the persons so meeting shall seasonably turn their carriages to the right of the centre of the road, so as to permit such carriages to pass without interference or interruption, under the penalty of five dollars, for every neglect or offence, to be recovered by the party injured. (1 *R. S.* 695, § 1.)

In England, a contrary usage prevails, and carriages meeting pass to the left; and this is the more reasonable, for so long as drivers sit on the right of their vehicle, so long will it be more convenient for meeting vehicles to pass to the left, as the danger of collision between them is thereby lessened.

Center of Road.—It is not the center of the *smooth* or *most traveled* part of the road that is the dividing line, but the center of the *worked* part, although the whole of the smooth or most traveled pathway be upon one side of that center. (*Earing v. Lansing*, 7 *Wend.* 185.) It is no defense that the party had no design to offend; that he attempted to prevent collision; that the road on his side was rough and rutty, but smooth on the other side, and that it was more difficult for him than for the other party

to turn out; unless the obstacles to turning out are insuperable or extremely difficult he is without excuse. (*Id.*)

In the above case, which was an action for the penalty, it appeared that the plaintiff and defendant were traveling along a highway in opposite directions, and in the beaten track; as they approached, the plaintiff was driving on a good trot, but the defendant slacked the pace of his horses and turned them and the wagon *entirely to the right of the beaten track*, and drove upon a part of the road which was very rough and rutty. The plaintiff continued to drive at the same rate, and kept directly in the smooth part of the road, and while the defendant was turning out, the plaintiff's wagon struck the wagon of defendant and broke defendant's axletree. The plaintiff's wagon sustained no injury. The center of the smooth or beaten part of the road on which the plaintiff traveled was two feet east of the center of the worked part of the road. On the plaintiff's right there was a smooth piece of ground on which he could have turned out. At the time of the collision the defendant was endeavoring to get further out of the road, and had the plaintiff checked his horse to a walk the accident would not have happened. The court charged the jury that the only question for them to decide was, whether the defendant was to the right of the center of the road or not, and that in deciding that question the center must be determined by the worked part of the road only. On appeal, the Supreme Court sustained this charge. SOUTHERLAND, J. said: "The court charged the jury that the true construction of the act was, that parties were to keep to the right of the center of the worked part of the road, and that unless the defendant was to the right of that center when the plaintiff's wagon came in contact with his, the penalty had attached, and that the situation of the road, as being rough and rutty on the defendant's side, or the want of design on his part to run against the plain-

tiff, would be no defense unless the road on his side was such as to render it impracticable for him to turn out; and that the case was not affected by the circumstance that the plaintiff was driving fast and the defendant slow. This is the sound construction of the act; it was designed to settle and establish the rights of travelers in such a manner, that there could be no mistake about them; each party is to keep to the right of the center of the worked part of the road; although it may be more difficult for one party to turn out than the other, that is no answer to the action. The act establishes, upon consideration of public policy, a broad general rule, which must be enforced, although sometimes it may operate inconveniently upon parties. It is not the center of the smooth or most traveled part of the road which is the dividing line, but the *center of the worked part*, although the whole of the smooth or most traveled path may be upon one side of that center, unless the situation of the road is such that it is impracticable or extremely difficult for the party to turn out. No such difficulty existed in this case. The road on the defendant's side was rough from having been rutted and frozen, but not so much so as to prevent any serious obstacle to his riding or driving over it. The questions of fact were properly left to the jury, and their verdict is warranted by the evidence."

Center in winter.—The rule, however, requiring persons meeting each other on a public highway, to keep their vehicles to the right of the center of the worked part of the road, does not apply in the winter season, when the depth of snow renders it impossible or difficult to ascertain the center of the worked part of the road. It is a reasonable construction of the statute, to define the center of the road, when obscured by snow, to be the center of the beaten or traveled track, without reference to the

worked part. (*Smith v. Dygert*, 12 Barb. 613; *Jaquith v. Richardson*, 8 Metcalf, 213.)

Seasonably turn.—By the terms "seasonably turn," &c., is meant, that the travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way, when he may have occasion to use it in passing. (*Brooks v. Hart* 14 N. Hamp. 310.)

The strict rule laid down above in the case of *Earing v. Lansing*, is not in accordance with the English decisions. The law of the road is not there regarded as inflexible. In *Wayde v. Carr*, (2 Dow. & Ry. 255,) the defendant's carriage was on the wrong side of the road, and the driver, in attempting to pass a hackney coach which interposed between his mistress' and the plaintiff's gig, on the near instead of the off side, injured the plaintiff, and it was held that it was for the jury to decide the question of negligence without regard to the law and usage of the road. The court said: "Whatever might be the law of the road, it was not to be considered as inflexible, and imperatively governing a case of this description. In the crowded streets of a metropolis, where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road, would not only be justifiable but absolutely necessary. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servants. They had acquitted him of negligence, and, having all the circumstances of the case before them, had found their verdict for the defendant. See, also, *Turley v. Thomas*, (8 Carr, and Payne, 103.) It is to be observed, however, that in England the "law of the road" is established by custom.

Railroad cars.—The statute, requiring carriages to turn to the right, does not apply to the meeting of railroad cars with common vehicles. The former run in a grooved track, and cannot turn to the right or left. The statute refers to cars where there is an equal ability in the carriages which are about to meet. It is, therefore, no negligence for a man, traveling on a street railroad and meeting a car, to turn to the left. (*Hegan v. Eighth Avenue R. R. Co.* 15 N. Y. R. 380.)

Travelers on horseback.—Nor is a traveler on horseback meeting another horseman or vehicle, on a public highway, required to turn out in any particular direction to avoid collision; all that is required is prudent care under existing circumstances. The rider must govern himself in this respect according to his notions of prudence. (*Dudley v. Bolles*, (25 Wend. 465.) But it is said that it is ordinarily a rule sanctioned by common consent and immemorial usage, that a person on horseback should yield the traveled path to one who is traveling in a wagon or other vehicle. (*Washburn v. Tracy*, (2 D. Chip. R. 128.)

Passing in same direction.—The provision of the statute applies only to cases of carriages passing. Where there is no other vehicle to intercept the driver he may pass on any part of the road he deems most convenient. (*Ashton v. Heaven*, 2 Esp. 533)

A traveler may use the middle or either side of the road at his pleasure, and is not bound to turn aside for another traveling in the same direction, provided there be convenient room to pass on the one hand or the other. If there be not sufficient room to pass, it is, doubtless, the duty of the other to afford it on request made, by yielding to the hindmost traveler an equal share of the road, if

that be adequate and practicable; if not, it must be deferred until the parties arrive at ground more favorable to its accomplishment. Should the leading traveler refuse to comply, he would be answerable for it in due course of law. But the other has no right to force a passage by a forcible collision. (*Bolton v. Colder*, 1 *Watts*, 360.)

Evidence of a custom for the leading carriage to incline to the right, the other passing at the same to the left, was held not to control the general law in such a case. (*Id.*)

If two persons are traveling in the same direction, and the hindmost traveler, in attempting to pass the other, carelessly or negligently collides with him and injures him, or if he so recklessly drive his horse as to run into the other's carriage and injure it, an action lies at the suit of the party injured, provided he be himself free from fault, and could not have avoided the collision by the use of ordinary care. (*Center v. Finney*, 17 *Barb.* 94.) In order to excuse the collision in such case, on the ground of inevitable accident, it must appear that the collision was unavoidable, and without any blame imputable to the defendant. (*Id.*) If ordinary diligence by the plaintiff will not prevent the injury, he is not considered in any degree the author of the wrong. (*Id.*) In the use of the public highway a party has a right to expect from others ordinary prudence, at least, and to rely upon that in determining his own manner of using the road; not to justify his own fool-hardiness, but to warrant him to pursue his own business in a convenient manner, where he has no reason to suppose the convenience or safety of others will be prejudiced thereby. (*Harpell v. Curtis*, 1 *E. D. Smith*, 78.)

It has been held that an action may be maintained for an injury received, even though done accidentally: the defendant being no otherwise to blame than driving a too spirited horse, or an unbroken horse, or pulling a wrong

rein, or imperfect harness. (*Wakeman v. Robinson*, 1 Bing. 213; 1 Cow. Tr. 3 Ed. 254.)

Stopping by wayside.—It is the right of travelers to stop temporarily by the roadside for their own convenience, provided they do not interfere with the use of the street for passing; but a man must not leave his horse and cart there unattended, if he do he will be liable for any damage done to them, although it is occasioned by the act of a passer by in striking the horse; for if a man choose to leave a horse and carriage standing in the street, he must take the risk of any mischief that may be done in consequence. (*Illige v. Goodwin*, 5 Car. & Payne, 190.) But where a horse was standing by the roadside properly attended, and became frightened at a passing show, broke away from the person holding it and ran away, the court held that the injury done by the horse was the result of inevitable accident, and did not entitle the plaintiff to recover. (*Goodman v. Taylor*, 5 Car. & Payne, 410.)

Road worthiness.—A traveler upon a highway is bound to have his harness and carriage in a good road-worthy condition, and is liable for any damages occasioned by insufficiency in this particular. Thus, where in going down hill, the defendant's cart broke and his horse became frightened thereby and ran away, the defendant was held liable. (*Welsh v. Lawrence*, 2 Chitty, 262; *Smith v. Smith*, 2 Pick. 621.)

2. TRAVELERS ON FOOT.

The law of the road relates exclusively to travelers in carriages meeting upon a public highway, and does not regulate the conduct of persons passing over the sidewalks of a city. (*Grant v. City of Brooklyn*, 41 Barb. 384.)

All persons have a right to walk in a highway or street, and are entitled to the exercise of reasonable care on the part of persons driving carriages along it. (*Boss v. Litton*, 5 Car. & Payne, 407.) So persons have clearly a right to cross streets, and persons driving carriages are liable if they do not take care so as to avoid driving against foot passengers who are crossing the road; and if a person driving along cannot pull up because his reins break; that will be no excuse, for he is bound to have proper tackle. (*Cotterill v. Starkey*, 8 Car. & Payne, 691; *Wakeman v. Robinson*, 1 Bing. 213.) But foot passengers must themselves use proper care, or they cannot recover for injuries sustained. (*Wolf v. Beard*, 8 Car. & Payne, 373.)

Thus, if a child of such tender age as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public street without any one to guard it, and is run over by a traveler and injured, no action lies against the traveler, unless the injury was voluntary on his part, or arose from his culpable negligence. (*Hartfield v. Rosser*, 21 Wend. 615.) The same rule it seems would apply in an action by a blind or deaf man, or a person *non compos*, who, under similar circumstances, received an injury on a public highway. (*Id.*) But where the defendant left a horse and cart unattended in the public street, and the plaintiff, a child under seven years of age, during the driver's absence, climbed upon the wheel, and other children urged forward the horse, whereby the plaintiff was thrown to the ground and the wheel fractured his leg. The court left it to the jury to say whether it was negligence in the defendant to leave his horse and cart for half an hour unattended, and whether that negligence occasioned the accident; and the instructions of the court were sustained on appeal. (*Lynch v. Nurdin*, 1 Ad. & El. (N. S.) 28; 41 Eng. Com. Law R. 422; see also *Robinson v. Cone*, 3 Law Reporter, (N. S.) 444), wherein

REDFIELD, J., disapproves of the case of *Hartfield v. Rosser*, above cited.

3. WHERE HIGHWAY IS IMPASSABLE.

It seems to be quite clear and well settled in this country, as well as in England, that if the highway be obstructed, the wayfarer may go over the adjoining land. He may remove any illegal, improper or inconvenient interruption, but if the ordinary track be foundeours and dangerous so as to compel him to leave the road, he may go *extra viam*, upon adjoining lands, passing as nearly to the original way as possible. (*Holmes v. Seely*, 19 Wend. 510); *Williams v. Safford*, 7 Barb. 309. He may also remove enough of the fence in the adjoining close to enable him to pass around the obstruction, doing no unnecessary injury; but he becomes a trespasser if he tears away other fences and tramples down the herbage in other parts of the close. (*Williams v. Safford*, *supra*.)

It was said by BIGELOW J., in *Campbell v. Race* (7 Cush. 408), that "such a right is not to be exercised from convenience merely, nor when by the exercise of due care, after notice of obstructions, other ways may be selected and the obstruction avoided. But it is to be confined to those cases of inevitable necessity or unavoidable accident; arising from sudden and recent causes which have occasioned temporary and impassable destructions in the highway. What shall constitute such inevitable necessity or unavoidable accident, must depend upon the various circumstances attending each particular case.

The nature of the obstruction in the road, the length of time during which it has existed, the vicinity or distance of other public ways, the exigencies of the traveler, are some of the many considerations which would enter into the inquiry, and upon which it is the exclusive province of the jury to pass in order to determine whethe

any necessity really existed which would justify or excuse the traveler."

4. RUNNING HORSES PROHIBITED.

No person, driving any carriage upon any turnpike road or public highway within this State, with or without passengers therein, shall run his horses, or cause or permit the same to run upon any occasion or for any purpose whatever; and every person who shall offend against the provisions of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined not exceeding one hundred dollars, or imprisonment not exceeding sixty days, at the discretion of the court. (1 R. S. 695, § 4.)

5. CONCERNING DRUNKEN DRIVERS.

No person owning any carriage running or traveling upon any road in this State, for the conveyance of passengers, shall employ or continue in employment any person to drive such carriage who is addicted to drunkenness, or to the excessive use of spirituous liquor; and if any such owner shall violate the provisions of this section, he shall forfeit at the rate of five dollars per day for all the time during which he shall have kept any such driver in his employment, to be sued for by the district attorney of the county in which such owner shall reside. The penalty, when recovered, shall be for the use of the poor of such county, except that the court, in which the recovery shall be had, may allow a portion of said penalty, not exceeding twenty-five dollars, to be retained by such district attorney, as a compensation for his services and expenses, beyond the taxable costs. (1 R. S. 695, § 2.)

When to be discharged.—If any driver, whilst actually employed in driving any such carriage, shall be guilty of

intoxication to such a degree as to endanger the safety of the passengers in the carriage, it shall be the duty of the owner of such carriage, on receiving written notice of the fact, signed by any one of said passengers, and certified by him on oath, forthwith to discharge such driver from his employment; and every such owner who shall retain or have in his service, within six months after the receipt of such notice, any driver who shall have been so intoxicated, shall forfeit at the rate of five dollars per day for all the time during which he shall keep any such driver in his employment after receiving such notice, to be sued for and applied as directed in the last preceding section. (1 R. S. 695, § 3.)

Leaving horses without being tied.—It shall not be lawful for the driver of any carriage, used for the purpose of conveying passengers for hire, to leave the horses attached thereto, while passengers remain in the same, without first making such horses fast with a sufficient halter rope or chain, or by placing the lines in the hands of some other person so as to prevent their running; and if any such driver shall offend against the provisions of this section, he shall forfeit, for the use of the poor, the sum of twenty dollars, to be recovered by action, to be commenced within six months. And, unless the amount of such recovery be paid forthwith, an execution shall be immediately issued therefor. (1 R. S. 696, § 5.)

Owners liable for acts of driver.—The owners of every carriage running or traveling upon any turnpike road or public highway for the conveyance of passengers, shall be liable, jointly and severally, to the party injured, in all cases, for all injuries and damages done by any person in the employment of such owner or owners, as a driver, while driving such carriage, to any person, or to

the property of any person; and that whether the act, occasioning such injury or damage, be willful or negligent, or otherwise, in the same manner as such driver would be liable. (1 *R. S.* 696, § 6.)

CHAPTER XVII.

CATTLE IN HIGHWAYS.

The law of 1862 (*ch.* 459), to prevent animals running at large in the public highways, was decided by the Court of Appeals to be unconstitutional, so far as it authorized the seizure and sale, without judicial process, of animals found trespassing within a private enclosure. (*Rockwell v. Nearing*, 35 *N. Y. R.* 302.) In order to bring the act within the limits of the constitution, it was amended by the Legislature in 1867, and provision was made for conducting the proceedings as other legal proceedings are conducted.

The law as amended will be given in full below.

Some remarks have already been made as to depasturing highways. (See *ante p.* 26.)

Before citing the provisions of the statute, it is proper to remark that the proceeding being to a certain extent of a summary nature, the utmost care is necessary in following its provisions; and any deviation from legal rules, in taking or disposing of the property, will subject the party to an action of replevin, or of trespass or trover, for the value thereof. (Per PORTER J. in *Rockwell v. Nearing*, *supra*.) (See also authorities cited by appellant's counsel in *Hurd v. Nearing*, 44 *Barb.* 476,)

In the case of *Rockwell v. Nearing*, above cited, MORGAN J. said, "Now, it nowhere appears that the owner permitted his cattle to run at large on the public highways, contrary to the provisions of the first section. As

the cow was not guilty of the offence, but the owner, it should appear, I think, that he suffered her to run at large, or was in some way remiss in not keeping her upon his own premises. It may often happen without fault of the owner, that his cattle go upon the public road. If they are there without the owner's fault, he cannot be deemed guilty of the offence mentioned in the first section of the act. His fences may be down without his knowledge; may be broken down by the wind or taken down by strangers, and his cattle may temporarily stray out upon the public highway. Does the statute intend to punish this as an offence? I think not; for it ought to have a reasonable construction, so as to embrace only those cases where the owner is himself guilty of some fault or negligence. This being a penal statute, can the court assume, without proof, that an offence has been committed by the plaintiff merely from the circumstance that his cow is found in the highway? I think there should be some proof, at least besides the mere fact that cattle are found in the highway, to justify a seizure. And without doubt, whoever seizes cattle upon the highway, under the act of 1862, without being able to show that they are there by the permission or negligence of the owner, seizes them without right. There may be some question whether the burden of proof is not cast upon the owner of the cattle to show that he is without fault in such a case."

The statute of 1862, *ch.* 459, as amended in 1867, *ch.* 814, is as follows:

Cattle not to run at large.—It shall not be lawful for any cattle, horses, sheep, swine or goats, to run at large in any public street, park, place or highway in this State. (*Laws* 1867, *ch.* 814, § 1.)

Duty of overseer.—And it shall be the duty of every overseer of highways within his district, and of every street commissioner in any incorporated village, to seize and take into his possession, and keep till disposed of according to law, any animal so found running at large. (*Id.*)

Penalty for suffering cattle to run in highway.—And any person suffering or permitting any animals to so run at large, in violation of this section, shall forfeit a penalty of five dollars for every horse, swine or cattle, and one dollar for every sheep or goat so found, to be recovered by civil action, by any inhabitant of the town, in his own name, or in the name of the overseers of the poor of the town, or by the proceedings hereinafter provided. (*Id.*)

Seizure of cattle running at large.—It shall be lawful for any person to seize and take into his custody, and retain till disposed of as required by law, any animal which may be in any public highway, and opposite to land owned or occupied by him, contrary to the provisions of the foregoing section, or of any animal which may be trespassing upon the premises owned or occupied by him. (*Id.* § 2.)

Proceedings after seizure.—Whenever any such person or any officer shall seize and take into his possession any animal, under the authority of the preceding sections, it shall be the duty of such person or officer to make immediate complaint in writing, under oath, stating the facts to a justice of the peace of the town in which such seizure occurred. (*Id.* § 3.) (For form of complaint, see Appendix No. 82.)

Summons.—And such justice shall, thereupon, have jurisdiction to hear and determine such matter, and shall, thereupon, proceed in the same manner as in civil actions, except as specially changed in this act, and shall, forthwith, issue a summons under his hand, stating the fact of such seizure and complaint, and requiring the owner of such animal, or any party having an interest in the same, to show cause before such justice, at a time and place to be specified in said summons, why said animal should not be sold and the proceeds applied as directed by this act; such time shall not be less than ten nor more than twenty days from the issuing of such summons. (*Id.*) (For form of summons, see Appendix No. 83.)

Service of summons.—The said summons may be served by any constable of the said town, or by any elector thereof authorized so to do by the said justice, in writing thereon; such service shall be made by posting the same in at least six public and conspicuous places in said town, and one of said places shall be the nearest district school house, unless the said seizure shall have been made within the bounds of an incorporated village, having the schools in charge of a board of education, and in such case one of such notices shall be posted in one of the buildings in which such schools are taught. (*Id.*)

Personal notice should be given to the owner where he is known and resides near.

It was remarked by PORTER, J., in *Rockwell v. Nearing, supra*, that "The defendant knew that the property he seized belonged to the plaintiff, who resided within a mile of him in the same town. Ordinary good faith required him to notify the owner that the lost cow was in his stable; and, though the act of 1862 is silent in respect to such notice, it may well be questioned, under the

authorities, whether the obligation to give it is not implied in a case where the owner is known."

Hearing of complaint.—At the time and place appointed for the return of said summons, the complainant aforesaid may appear, and any party or person owning or having an interest in said animal, or his agent duly authorized, shall be allowed, by the said justice, to appear in the said proceedings; and on his filing with said justice an answer, under oath, subscribed by him or his agent aforesaid, denying any or all the facts alleged in said complaint, an issue shall be deemed joined in the said proceedings, and the subsequent proceedings shall be as in civil actions, so far as they can be, unless otherwise provided in this act. (*Id.*)

When and how sale made.—If no one shall appear to show cause, and the said summons shall be returned by a constable duly served, or by proof showing that fact, if served by any person other than a constable, or if the jury or the justice shall find, after a trial, that no sufficient cause is shown why such sale should not be made as directed by this act, then the said justice shall issue his warrant, under his hand, directed to any constable of the said town, commanding him to sell the said animal at public auction, for the best price he can obtain therefor, and make return thereof to the said justice, at a time and place therein specified, not less than ten nor more than twenty days thereafter. (*Id.*) (For form of warrant, see Appendix No. 84.)

Notice of sale.—The said sale shall be made on the like notice as on constables' sale on civil process; and the said constable shall make return as required by the said warrant, and pay the proceeds of said sale to said justice. (*Id.*) (For form of return, see Appendix No. 85.)

Costs and expenses.—The said justice shall thereupon adjudge the costs of said proceedings, the same amounts being allowed as in civil actions; and, in addition, he shall allow to the party or officer making such seizure, for every horse or colt, one dollar; for every cow, calf, or other cattle, each fifty cents, and for every goat, sheep or swine, twenty-five cents, together with the actual damages sustained by such party, by reason of the trespass or breaking of such animal into his premises, and a reasonable compensation to such person or officer, to be estimated by such justice, for the care and keeping of such animals, from the time of the seizure thereof to the sale; and the said justice shall be allowed the sum of one dollar for each animal so sold, and the constable the same fees as for service of a summons and execution in civil actions. (*Id.*)

To whom penalty to be paid.—And the penalty in the foregoing sections prescribed shall be paid to the overseers of the poor, or the officers or board having the support of the poor in charge. (*Id.*)

To whom surplus to be paid.—If, after paying the sums aforesaid, there shall be any surplus of the proceeds of said sale, the said justice shall pay the same to the owner or party establishing before him, on the return of said summons, or at such other time as he shall appoint the right to the same. (*Id.*)

Where surplus is not claimed.—If no person shall claim said surplus within one year after such seizure, the said justices shall pay the same to the overseers of the poor of such town, or the officer or board aforesaid, for the benefit of the poor thereof. (*Id.*)

When surplus to be demanded.—If such owner or party interested shall not appear and demand such surplus within said year, he shall be forever precluded from recovering any part of such moneys, and the receipt of the overseers of the poor of said town, or officer or board aforesaid, given at any time after the expiration of said year, shall be a full discharge to said justice for the same. (*Id.*)

When owner may obtain animals before hearing.—Any owner of any animal which shall have been seized under and pursuant to the foregoing provisions may, at any time, before the justice aforesaid shall proceed to the hearing on the return of said summons, demand and shall be entitled to the possession of such animal, upon the payment to said justice of the several sums hereinbefore required to be paid to the said justice and constable, and to the person or officer by whom the seizure aforesaid shall have been made, and the penalty aforesaid, when such seizure is made by any officer, together with a reasonable compensation to the person or officer making such seizure, for the care and keeping of such animal, to be ascertained and fixed by such justice, and upon making to such justice satisfactory proof of ownership. (*Id.* § 4.)

When after hearing and before sale.—And if such owner shall not have appeared upon said return day, and shall excuse such non-appearance to the satisfaction of said justice, and shall make such demand at least three days before the time appointed for such sale, he shall be entitled to the custody and possession of such animal, upon paying one-half of the several sums above stated, together with the whole amount of penalty, compensation and damages which the said justice shall then adjust and award. (*Id.*)

When animals set at large by third persons.—In case the animal so seized under the foregoing provisions of this act shall have been so running at large or trespassing, by the willful act of any other person than the owner, to effect that object, such owner shall be entitled to the possession of such animal, at any time before the actual hearing shall be commenced on the return of said summons, on making the demand therefor, and the proof required in the next preceding section, and on paying to such person or officer making such seizure the amount of compensation fixed by such justice for the care and keeping of such animal, and without paying any other charges. And the person committing such willful act shall be liable to a penalty of twenty dollars, to be recovered in an action at law at the suit of the owner of such animal, or the person or officer making such seizure. (*Id.* § 5.)

Appeals to county court.—An appeal may be taken by either party who shall have appeared and contested in said proceeding before such justice, to the county court; and all laws relating to appeals from judgments of justices' courts, and the jurisdiction, powers and duties of county courts; to hear and determine such appeals and the proceedings therein, shall be applicable to said appeals, so far as the same can be applied, and are consistent with this act. (*Id.* § 6.) (For form of appeal see Appendix No. 86.)

When and how appeal to be taken.—Such appeals can only be taken from the finding or determination, that cause exists or does not exist, for the sale aforesaid, and must be taken within ten days after such finding or determination, and such appeal, when made by a claimant, shall not be effectual for any purpose unless the undertaking required on appeal to the county court contains a clause that, in

case the finding or determination shall be affirmed, the claimant will pay all such sums as the said justice shall determine and adjudge for the costs, penalties and allowances so as aforesaid authorized to be made. (*Id.*)

In case of affirmance.—In case of an affirmance by the county court, said court shall appoint a time and place when said justice shall adjust the same, and such adjustment shall be made in the manner and for the sums hereinbefore specified. (*Id.*)

Where undertaking is given.—In case such undertaking is given and approved by the said justice, he shall forthwith direct the said sale not to be had, and shall order the said animal to be delivered to the appellant, if it shall appear to him that he is the owner or entitled to the possession thereof. (*Id.*)

When person seizing to pay costs, &c.—In case any person making such seizure, shall fail on said hearing to show causes sufficient to obtain such rule, the said justice shall render judgment against him for costs. (*Id.* § 7.)

Where seizure was malicious.—And if the jury or said justice shall find, from the evidence, that such seizure was malicious and without probable cause, the jury or the justice may assess the amount of damages sustained by the owner, by means of such seizure, and judgment shall, in such case, be given for double the amount assessed, with costs. (*Id.*)

Actions for any cause of action, arising out of any proceeding had or taken, or attempted to be had or taken, under the above act, can only be commenced within one year after the cause of action shall have accrued. (*Laws 1867, ch. 814, § 7.*)

CHAPTER XVIII.

WAYS AND PRIVATE ROADS.

1 Definition and nature of ways.

2 Ways by prescription.

3 Ways by grant.

4 Ways from necessity.

5 Private roads under the statute.

6 Right of way, how pleaded.

1. DEFINITION AND NATURE OF WAYS.

A right of way is a privilege which one person, or particular description of persons, may have of going over another man's land in some particular line, and is termed, in law, an incorporeal hereditament. (3 *Kent*. 419; *Washb. on East*. 215; *Boyce v. Brown*, 7 *Barb.* 80.) It may arise by proceedings under the statute, by grant, reservation, prescription, or necessity. (*Boyce v. Brown*, *supra*.) A right of way is but an incorporeal hereditament, an easement which *per se* does not divest the owner of the fee of the land; and, for every other purpose, except the use or servitude as a way, the soil belongs to him, and he is entitled to the same remedies for an injury to his residuary interest, that he would be entitled to if it was entire and absolute. (*Gidney v. Earl*, 12 *Wend.* 98; per NELSON, J. So, a grant of a way across a man's land conveys no right to the soil, rocks or other things, within the bounds of the way. (*Jamaica Pond v. Chandler*, 9 *Allen*, 164.)

In gross or appendant.—A right of way is either *in gross* or *appendant* to land. A right of way is said to be *in gross*, when it is attached or limited to the person using it; but a way is never presumed to be *in gross* when it

can fairly be construed to be appurtenant to the land (*Washb. on East.* 217.)

If a right of way be in gross or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and is so exclusively personal, that the owner of the right cannot take another person into partnership with him. (3 *Kent*, 420.)

But when a right of way is appendant or annexed to an estate, it may pass by assignment when the land is sold, to which it was appurtenant. Thus, if one be seized of lot A and lot B, and he use a way from lot A over lot B, to a mill or to a river, and he sell lot A, with all ways and easements, the grantee shall have the same privilege of passing over lot B that the grantor had. (3 *Kent*, 420.)

Appendant.—Ways are said to be appendant or appurtenant, when they are incident to an estate, one terminus being on the land of the party claiming. They must inhere in the land, concern the premises, and be essentially necessary to their enjoyment. They are of the nature of covenants, running with the land, and like them, must respect the thing granted or demised, and must concern the land or estate conveyed. A way appendant cannot be turned into one in gross, because it is inseparably united to the land to which it is incident. (*Washb. on Ease.* 217.)

A right of way appurtenant to land attaches to every part of it, though it may go into the possession of several persons. Each owner will be entitled to a way. (*Underwood, v. Corney*, 1 *Cush.* 285; *Lansing v. Wiswall*, 5 *Denio*, 213.)

2. WAYS BY PRESCRIPTION.

A right of way may arise by prescription. A prescription supposes a grant before the time of legal memory.

It is founded on the immemorial use of the way by the claimant and his ancestors, or by those whose estate he has, which last is called prescribing in a *que estate*. Immemorial use is a use time out of mind. Time out of mind in this State is twenty years. (*Miller v. Garlock*, 8 Barb. 154, per PAIGE.)

An uninterrupted use and enjoyment of a right of private way over the land of another for twenty years becomes an adverse enjoyment sufficient to raise the presumption of a grant. The use for twenty years to be conclusive evidence of right, must have been continuous, uninterrupted and exclusive; that is, under a claim of right, with the knowledge and acquiescence of the owner. The time of the enjoyment is deemed to be uninterrupted when it is continued from ancestor to heir and from seller to buyer. (*Id.*; 3 Kent, 442; *Corning v. Gould*, 16 Wend. 534.)

The use of the easement for twenty years unexplained, will be presumed to be under a claim or assertion of right, and adverse, and not by leave or favor of the owner. (*Id. Lansing v. Wiswall*, 5 Denio, 213.)

There are various methods of meeting, qualifying and explaining the evidence adduced to establish the user during twenty years; and where a case the least questionable is made, it has commonly been the course to leave it to a jury to say whether they will presume a grant. (*Corning v. Gould*, 16 Wend. 534, and cases cited.)

In one case it was said that if the jury find a verdict in favor of a prescription, the court will not take notice judicially, whether as a matter of fact such a prescription could have existed. As where one prescribed to travel in *coaches and chariots* between certain limits, it was urged that this could not be because coaches and chariots, being of modern invention, had not been in use time out of mind. But the court said that the jury found it; that it

was a matter of fact of which they could not take notice after a verdict; but on the contrary they were bound to receive it according to the finding of the jury. (*Chichester v. Lethbridge, Willes, 71.*)

The enjoyment of a way for more than twenty years by license of the owner, confers no right by prescription. (*Boyce v. Brown, 7 Barb. 80.*) So where a right of way is reserved by deed, and the grantor and those claiming under him have used it in a manner nearly corresponding with the terms of the reservation, though long enough to give a prescriptive title, the use must have been intended to have been under the deed, not adverse, and therefore the right will be limited by the terms of the reservation. (*Atkins v. Boardman, 2 Met. 457.*)

To establish a right of way by user or prescription, the user must be confined to one certain tract. (*Holmes v. Seeley, 19 Wend. 511.*)

Where the owner of lands across which others have a prescriptive right of way, for his own convenience closes such way and opens another across other parts of his lands for the use of those having the right, and they assent to the change and use the new way for a period less than twenty years, the owner cannot close such new way and prevent its use, without first restoring the old one to its former condition. If the owner of the lands, without restoring the old way, remove a bridge over a stream crossing the new one, those having the prescriptive right to the old way may rebuild the bridge or fill the stream where such bridge stood, doing as little damage as possible to the owner of the land, and continue the use of the new way until the old one is restored. (*Hamilton v. White, 5 N. Y. R. 9.*)

How extinguished.—A right of way acquired by prescription may be lost or extinguished by non-user for

twenty years, (*Smyles v. Hastings*, 22 *N. Y. R.* 224,) but not by a non-user short of that period. (*Corning v. Gould*, 16 *Wend.* 531; *Miller v. Garlock*, 8 *Barb.* 155.) A non-user for twenty years unaccounted for, will afford a presumption of a release or surrender of the right. But the mere non-user of an easement, even for twenty years, will not necessarily raise a presumption of its extinguishment, unless there has been in the mean time some act done by the owner of the land charged with the easement, inconsistent with, or adverse to the existence of the right. And in that case a release or extinguishment of the right will be presumed. (*Miller v. Garlock*, 8 *Barb.* 155, per PAIGE; see, however, *Corning v. Gould*, 16 *Wend.* 535.)

3. WAYS BY GRANT.

A right of way may arise by grant, as where the owner of a piece of land grants to another the liberty of passing over his land in a particular direction. It may be a grant to pass over the farm of another, or over a particular field, or to a spring or creek, etc. The deed can be so limited in its terms, as that the grantee may have the right of passing or repassing when he pleases, or his family, or on horseback, or in carriage; or it may be limited to certain purposes, as to get water, go to mill or to church.

It is a principle of law that nothing passes as incident to the grant of an easement, but what is requisite to the fair enjoyment of the privilege. (*Lyman v. Arnold*, 5 *Mason*, 195.) A right of way for one purpose does not necessarily include a right of way for another purpose. The extent of the right must depend upon the circumstance. (*Ballad v. Dyson*, 1 *Taunt.* 279.) But the grantor is bound to afford reasonable facilities for the enjoyment of the way by the grantee. (*Bakeman v. Talbot*, 31 *N. Y. R.* 266.)

A grant of an estate with "ways heretofore used," or "ways in use," or the like, passes all existing ways in actual use at the time, whether the same are used by the grantor over other parts of his own estate, and so are not properly appurtenant to such granted parcel, or are appurtenant to the same, by having been in use over the land of another. But a mere reference in the deed to an intended way, without an express grant, will not pass such way. (*Wash. on Ease*. 225.) However, if owners of lands survey and map it into lots, with a road marked out as separating them and convey, describing the lots by their numbers and reference to the map, a right of way passes as appurtenant to the land. (*Smiles v. Hastings*, 24 Barb. 44; *Aff'd*. 22 N. Y. R. 217; *Clements v. West Troy*, 16 Barb. 250; see also *Bissell v. N. Y. Central Railroad Co.* 23 N. Y. R. and the cases cited in *Washb. on Ease*. 226.)

When by deed.—In general a grant of a right of way would be made by deed. But there is a difference in this respect between grants of land to which a way is appendant and a grant of way in gross. In the first case, although there were a parol lease for less than three years, the way would pass, according to the rule that whatever is incident to land passes by the description of the land; but in the second case it goes with the person, and must take effect by deed. (*Woolhrych on Ways*, 15; 2 Ro. Abr. 60; *Beandely v. Brook*, Cro. Jac. 189.)

What words will pass.—Unless a way be appendant to land, a grant of that land will not include the way without express words. And it will not pass under the term "tenement." But if it be appurtenant, it will necessarily pass under the word appurtenances. (*Woolhrych on Ways*, 17.) A grant is always construed strongly against the

grantor—so that if he should grant premises with all ways, all ways ordinarily used will go to the grantee.

How proved.—Where the deed, granting a way, defines its course, etc., it is not to be controlled by parol testimony as to what the parties intended, or to contradict the terms of the grant. (*Shepherd v. Watson*, 1 *Watts*, 35; *Ballard v. Dyson*, 1 *Taunt.* 279.) But where there is a question as to the width of the way and both parties claim, under one remote grantor and grantee, reference may be had to the deed of the original grantor who created it. (*Brown v. Stone*, 10 *Gray*, 65.) Where a right of way is granted without any designation of the precise place in the deed, it becomes located by usage for a length of time; and being so located it cannot afterwards be changed by the grantor. But if it has been changed, and the grantee has used the new way for a length of time, his acquiescence in the alteration will be presumed. (*Wynkoop v. Burger*, 12 *John*, 222.)

Grantee to repair.—The grantee of a private way, for his own accommodation, must keep it in repair. (*Wynkoop v. Burger*, 12 *John*. 222; *Bakeman v. Talbot*, 31 *N. Y. R.* 372, per BROWN.) He cannot deviate from the way and go upon another part of the grantor's land when the way becomes impassable, whether the obstructions are accidental or the act of the owner of the soil. (*Williams v. Safford*, 7 *Barb.* 309; *Bakeman v. Talbot*, *supra*.) He may, however, remove all obstructions placed in it. (*Id.*)

How abandoned.—A right of way acquired by deed can not be lost by non user. Nothing short of a holding strictly adverse for twenty years can produce that result. (*Smyles v. Hastings*, 22 *N. Y. R.* 224, *affirming* 24 *Barb.* 44.)

4. WAYS FROM NECESSITY.

It is a principle of law that the grant of a thing shall carry all things included, without which the thing granted cannot be had. Therefore, if A have an acre of land in the middle of, and surrounded by other of his lands, and sell that acre to B, here of necessity a convenient way arises on B's behalf to go over A's ground, as a necessary incident. (*Woolr. on Ways*, 20; 3 *Kent*, 513; *Holmes v. Seely*, 19 *Wend.* 507.) It is said to be the same though the land sold be not wholly inclosed by the lands of the grantor, but partly by the lands of strangers, for the grantee may not go over strangers' land. (*Clark v. Rugge*, 2 *Roll. Abr.* 60; *Smyles v. Hastings*, 22 *N. Y. R.* 217.)

This way of necessity should be a convenient one over the adjoining close of the grantor, due regard being had to the interests of both parties. Subject to this rule the grantor may, in the first instance designate the way, and if he neglect to do so, the grantee may choose for himself; but he cannot claim the right to several ways, for the right cannot be carried beyond the necessity. (*Holmes v. Seely*, 19 *Wend.* 510.)

The right of way from necessity, over the land of another, is always of *strict necessity*, and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That the way through his own land is too steep or too narrow, does not alter the case. It is only where there is no way through his own land that the right of way over that of another can exist. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff. (*M'Donald v. Lindall*, 3 *Rawle.* 492.) Nor can one claim a way by necessity because of its superior convenience over another way which he has. (*Dodd v. Burchell*, 1 *H. & Colt.* 122.)

When grantor has way of necessity.—If a man have several distinct parcels of inclosed land, and he sell all but one surrounded by the others, and to which he has no way or passage except over one of the lots sold, he is entitled to a right of way against his own deed, even where no right of way is reserved. (3 *Kent*, 421, and cases cited.)

How long exists.—A right of way from necessity, continues only so long as the necessity which creates it exists; and this applies as well to a subsequent owner of the estate to which such way attaches, as to the first grantee in whose favor it was originally raised. It is not enough that it continues to be a way of convenience, if it ceases to be indispensable as a means of access to the land. (*Woolr.* 23; *N. Y. Life Ins. & Co. v. Milnor*, 1 *Barb. ch.* 353; *Holmes v. Seeley*, 19 *Wend.* 507; *Washb. Ease.* 220.) It would not be enough, however, that one having such way of necessity, should acquire a parcel of land adjoining that to which such way belongs, to which there is access by a prescriptive right of way, since the owner of such prescriptive way could only use it as a means of access to the particular parcel to which it is appurtenant. (*N. Y. Life Ins. & Trust Co. v. Milnor*, 1 *Barb. ch.* 353.)

Passing extra viam.—It has been intimated in one or two cases—though the question was not in issue—that there is a distinction between a private way by grant and one of necessity, resting upon the ground that one is the grant of a specific track over the close, while the other is a general right to a way over it; the one an express specific grant, the other a more general implied one; and that therefore, in the case of a way of necessity, a passage *extra viam* may be justified when the usual track is ob-

structed. (*Holmes v. Seeley*, 19 *Wend.* 510, per NELSON, Ch. J.; *Taylor v. Whitehead*, *Doug.* 748.) But in *Williams v. Safford*, (7 *Barb.* 309), it was expressly decided that there is no distinction between such ways, and that in no case is a passage *extra viam* justified.

5. PRIVATE ROADS UNDER THE STATUTE.

Application, how made.—An application for a private road shall be made in writing, specifying its width and location, courses and distances, and the names of the owners and occupants of the land through which the road is proposed to be laid out. (*Laws* 1853, *ch.* 174, § 1.)

An application to the commissioner under the above provision is sufficient, if it states the width, location, courses and distances of the road, and the other matters specified by the section, in general terms, without more precision than is necessary to enable the owners of land to know what part of their property is intended to be taken, and to enable the jury to determine intelligently upon the necessity of the road, and assess the damages. (*People v. Taylor*, 34 *Barb.* 481.) For form of application, see Appendix, No. 87.)

Jury to be called.—The commissioner or commissioners, to whom such application shall be made, shall, thereupon, appoint as early a day as the convenience of the parties interested will allow, when, at his office a jury will be selected for the purpose of determining upon the necessity of such road, and to assess the damages by reason of the opening thereof. (*Id.* § 2.)

Copy of application and notice to be delivered to applicant.—Such commissioner or commissioners shall, thereupon, deliver to the applicant a copy of such application, to which shall be added a notice of the time and place

appointed for the selection of such jury, addressed to the owners and occupants of such land. (*Id.* § 3.) (For form of notice, see Appendix No. 88.)

Service of notice and application.—The applicant, on receiving such copy and notice, shall, on the same day or the next day thereafter, cause such copy and notice to be served upon the persons to whom it is addressed, by delivering to each of them who resides in the same town a copy thereof, or in case of his absence, by leaving the same at his dwelling house, and upon such as reside elsewhere, by depositing in the post office a copy thereof to each, addressed to them respectively at their places of residence, and paying the postage thereon, or, in case of infant owners, by like services upon their parent or guardian. (*Id.* § 4.)

List of jurors.—At such time and place, on due proof of the service of such notice, such commissioner, or in a town where there are more than one, either of them shall present a list of the names of eighteen persons, residents of said town, who are freeholders, and in no wise of kin to such applicant, owner or occupant, or either of them, and not interested in such lands. (*Id.* § 5, as amended in 1860, *ch.* 468.)

The remainder of the above section as amended, providing for an appeal, is given hereafter. (For form of list, see Appendix No. 89.)

Certain number may be struck from list.—The owners or occupants of such lands may strike off from such list any number of names not exceeding six; the applicant may, in like manner, strike off six names or less, and the persons whose names are not stricken off, or, if more than six names are left upon the list, then the six persons,

whose names stand first upon the list, shall be the jury for the purpose aforesaid. (*Id.* § 6.)

Place of meeting.—The commissioner shall then appoint some convenient time and place for the jury to meet and be sworn in the premises, and shall summon them accordingly. (*Id.* § 7.)

Jury to be sworn.—If, at the time and place last mentioned, all the persons named as such jury shall meet, they shall be sworn well and truly to determine as to the necessity of said road, and to assess the damages by reason of the opening thereof; if one or more of such six persons shall not appear, the commissioner shall summon, of the bystanders or others, so many, free from all legal objections, as will be sufficient to make the number six, who shall be sworn as aforesaid. (*Id.* § 8.)

Commissioners to swear jury.—Such commissioner is hereby authorized to swear the jury, and to administer any oath necessary to carry this act into effect. (*Id.* § 9.)

Proceeding of jury.—The jury shall view the premises, and, after hearing the allegations of the parties and such witnesses as they may produce, shall proceed to deliberate and make up their verdict; and, if they shall determine that the proposed road is necessary, they shall assess the damages to the person or persons through whose land the same is to pass, and deliver their verdict, in writing, to the commissioners. (*Id.* § 10.) (For form of verdict, see Appendix No. 90.)

In determining as to the necessity of the road, and in assessing damages, the jury should proceed as in case of public highways. The proceedings in such cases have been, heretofore, given.

Value of road discontinued.—If the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway running through the lands belonging to the same person or persons, through whose lands the private road is proposed to be opened, the jury shall take into calculation the value of the road so discontinued, and the benefit resulting to such person or persons by reason of such discontinuance, and shall deduct the same from the damages assessed for the opening and laying out of such private road. (*Id.* § 11.)

It is only where the necessity of such private road has been occasioned by the alteration or discontinuance of a public highway, running through lands belonging to the same person, that the deduction is to be made.

Proceedings after verdict.—The commissioner shall annex to such verdict the application mentioned in the first section of this act, and hand the same to the town clerk, who shall file the same, and the commissioner or commissioners shall lay out and make a record of said road, as described in the petition of the applicant. (*Id.* § 12.)

Proceeding may be adjourned.—In case any accident shall prevent any of the proceedings required by this act to be done on the day assigned, the proceedings may be adjourned to some other day, and the commissioner shall publicly announce such adjournment. (*Id.* § 13.)

Damages to be paid before opening road.—The damages assessed by the jury shall be paid by the party for whose benefit the road is laid, before the said road shall be opened or used. But in case the assessors of said town shall certify that the necessity of such private road was occasioned by the alteration or discontinuance of a public highway, such damages shall be paid by said town and refunded to the applicant. (*Id.* § 14.)

Description of road abandoned.—Whenever any public highway, or any part thereof, by reason of alterations made therein, or by the opening of a new road, or in any other way, shall be abandoned by the public, and is no longer used as a public road, the commissioners or commissioner of highways, shall file in the town clerk's office of the town, a description in writing signed by them or him, of the road so abandoned, and the same shall thereupon be discontinued. (*Id.* § 15.)

Roads along division lines.—Whenever a public or private road shall be laid along the division line between the lands of two or more persons, and wholly upon one side of said line, and the lands upon both sides of said division line shall be cultivated or improved; then and in that case the person owning or occupying the lands joining said road shall be paid for building and maintaining such additional fence as he may be required to build or maintain by reason of the laying out and opening said road, which said damages shall be ascertained and determined in the same manner that other damages are now ascertained and determined in the laying highways or private roads. (*Id.* § 16.)

Appeals.—And if any person shall consider himself aggrieved by the said decision of the freeholders, either in laying out or closing a road, he may within sixty days after such determination shall have been filed in the office of the town clerk, appeal to the county judge of the county in the same manner as appeals were heretofore allowed to be made to those judges under title first, article fourth, chapter sixteenth, part first of the Revised Statutes. (*Last clause of section 5, of act of 1853 as amended 1860, ch. 468.*)

The county judge having acquired jurisdiction by the appeal, becomes vested with the same authority to dispose

of such appeal in the manner provided in reference to public roads, which includes the appointment of referees. (*West v. McGurn*, 43 Barb. 198.) For the manner of proceeding on appeal, see heretofore the chapter on that subject.

Repeal of certain acts.—The act entitled “An act in relation to laying out private roads,” passed March eighth, eighteen hundred and forty-eight, and the tenth section of the act entitled, “an act to amend an act entitled, ‘an act to reduce the number of town officers, and town and county expenses, and to prevent abuses in auditing town and county accounts,’ passed May tenth, eighteen hundred and forty-five,” passed December fourteenth, eighteen hundred and forty-seven, are hereby repealed.

For what purpose road to be used.—Every such private road, when so laid out, shall be for the use of such applicant, his heirs and assigns; but not to be converted to any other use or purpose than that of a road. Nor shall the occupant or owner of the land through which such road shall be laid out, be permitted to use the same as a road unless he shall have signified his intention of so making use of the same, to the jury or commissioners who ascertained the damages sustained by laying out such roads, and before such damages were so ascertained. (1 R. S. 517, § 79.)

If the occupant of the land, at the time a private way is laid out, does not signify his intention to make use of it, so that the damages may be assessed accordingly, the person on whose application it is laid out, has an exclusive right to use it, and may maintain trespass on the case against the former, for injuries done by his using it. (*Lambert v. Hoke*, 14 John. 383.)

Width of roads.—All private roads to be laid out by the commissioner, shall not be more than three rods wide. (1 R. S. 517, § 80.)

The owner of the lands must so build his fence as to leave the road the full width as laid out by the commissioners; he cannot build a Virginia or zig zag fence, placing the center on the exterior lines of the road as laid out, with the angles projecting into the road. But a party will be deemed to have assented to such location of the fences, if he gave his consent to have the defendants' damages assessed with reference to such fence as was built, or if he permitted the fence to be thus built without objection. (*Herrick v. Stover*, 5 Wend. 580.)

Cannot go on adjoining lands.—The owner of the private road has no right to go upon the adjoining lands when his road is obstructed or impassable, even where the road was so obstructed by the owners of such adjoining lands. (*Williams v. Safford*, 7 Barb. 309.)

6. RIGHT OF WAY HOW PLEADED.

In pleading a way by prescription or grant, the particular grounds of the title must be set forth, and, as a way of necessity, is in truth nothing else but a way by grant, it must be pleaded in the same manner; and, if its origin cannot be any longer traced, must be claimed by grant or prescription, and pleaded as such, or, in some cases as a non-existing grant. (*Boyce v. Brown*, 7 Barb. 88.) And if there once existed unity of possession, some authors have supposed that it must be claimed by way of grant. The better opinion now is, that a way of necessity cannot be pleaded as in general terms. Indeed, it seems there is no general way of necessity, without specifying the manner whereby the land over which it is claimed

becomes charged with the burden. Such was the decision in *Bullard v. Harrison*, (4 M. & Sel. 387.) It should be alleged, that the party pleading the way could not have gone upon his own land, or that there was no other way. (*Boyce v. Brown, supra, and cases there cited.*)

CHAPTER XIX.

PLANK ROADS AND TURNPIKES.

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| <ol style="list-style-type: none"> 1. How incorporated. 2. Management of company. 3. Application to supervisors for leave to construct road. 4. Commissioners to be appointed. 5. Lands how to be procured. 6. Provision in case of using highway. 7. Construction and repair of roads. 8. Inspectors to be appointed. 9. Erection of gates. | <ol style="list-style-type: none"> 10. Of tolls and their collection. 11. Penalties for injuring or obstructing. 12. Of taxes on roads. 13. Of branch roads and extensions. 14. Powers of purchasers under mortgage or execution. 15. Actions against corporations and stockholders. 16. How discontinued. |
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1. HOW INCORPORATED.

Any number of persons, not less than five, may be formed into a corporation, for the purpose of constructing and owning a plank road, or turnpike road, by complying with the following requirements: Notice shall be given in at least one newspaper, printed in each county through which said road is intended to be constructed, of the time and place or places where books for subscribing to the stock of such road will be opened; and when stock to the amount of at least five hundred dollars for every mile of the road so intended to be built, shall be in good faith subscribed, then the said subscribers may, upon due and proper notice, elect directors for said company; and, thereupon, they shall severally subscribe articles of association, in which shall be set forth the name of the company, the number of years that the same is to continue, which shall not exceed thirty years from the date of said articles, whether it is a plank road or a turnpike, which the company is formed to construct; the amount of the

capital stock of the company; the number of shares of which the said stock shall consist; the number of directors, and their names, who shall manage the concerns of the company for the first year, and shall hold their offices until others are elected; the place from and to which the proposed road is to be constructed; and each town, city and village into or through which it is intended to pass, and its length, as near as may be. Each subscriber to such articles of association, shall subscribe thereto his name and place of residence, and the number of shares of stock taken by him in said company. The said articles of association may, on complying with the provisions of the next section, be filed in the office of the Secretary of State, and, thereupon, the persons who have so subscribed, and all persons who shall, from time to time, become stockholders in such company, shall be a body corporate, by the name specified in such articles, and shall possess the powers and privileges, and be subject to the provisions contained in titles three and four, chapter 18 of the first part of the Revised Statutes. (*Laws 1847, ch. 210, § 1, as amended 1849, ch. 250, § 13.*)

The titles of the Revised Statutes referred to relate to the general powers, privileges and liabilities of corporations, and to special provisions relating to certain corporations.

What defects shall not invalidate.—By chapter 248 of laws of 1862, it was provided that no plank road or turnpike road company, corporation or association, formed or organized under the above act, and the acts amending the same shall be deemed invalid, or to have forfeited any of its powers, rights or franchises, by reason of any failure on the part of such company, or the persons organizing the same, to have complied with the requirements of such acts in the formation or organization of such com-

pany, as to the number of stockholders or persons who signed the articles of association of such company or association, or in the publication of notices in the organization thereof, or by reason of any informality or defect in the signing of such articles of association, or in the publication of the notices aforesaid; and the stockholders, officers and creditors of every such company, are hereby declared to have the same rights, and the stockholders to be subject to the same obligations and liabilities as if such company had strictly complied with all the requirements of the law aforesaid, to create and perfect a complete body corporate; provided that this act shall only apply to such companies as shall have attempted an organization, and shall have actually constructed a road wholly or in part, according to their articles of association.

Preliminary subscription.—It is no objection to the validity of a subscription to the capital stock of a company organized under the above law, that it was made upon a separate paper which only a portion of the stockholders had subscribed; there having been several similar papers used in lieu of the books, required by the act, to be opened in different places for subscription. Nor is it any objection to the validity of such a subscription, or the rights of the company subsequently organized, to maintain an action upon it, that, at the time it was made there was no company in existence. (*The Hamilton, &c. Plank Road Co. v. Rice*, 7 Barb. 157.)

It has, however, been recently decided that under this act, those only who subscribe the articles of association can be compelled to pay for stock. The preliminary subscription and other steps, prior to the signing of the articles of association, are provisional and inchoate, creating no fixed right and imposing no obligation on the parties. (*Poughkeepsie &c. Plank Road Co. v. Griffin*, 24 N. Y.

R. 150.) In the case of *The Eastern Plank Road Co. v. Vaughn*, (14 N. Y. R. 546,) where the defendant signed an instrument stating that, for value received he promised to pay two persons named a specified sum for the purpose of building a plank road between two places, and authorized them to transfer such subscription to a corporation thereafter to be formed for that purpose; and such corporation was afterwards formed and the subscription transferred to it. It was held that the defendant was liable, on such instrument, in an action by the corporation to recover its amount, not strictly as a subscriber for stock, but as on a promise resting, for its consideration, upon the object expressed in the instrument, and the equitable right of the company to the benefit of the promise in furtherance of such object undertaken in so far as the defendant's request.

Subscription must be absolute.—The subscription to the stock of the corporation must be absolute. Conditional subscriptions are void. Thus, where the plaintiff's articles of association provided for the construction of the road to a certain point, with the privilege of extending it to a certain other point, and a large majority of the stockholders became such by subscribing the articles, leaving such extension optional with the directors, and the defendant subsequently signed an agreement on the books of the company to take twenty-five shares of stock, provided the directors would make such extension, such agreement was held to be void by reason of the condition therein. (*Fort Edward &c. Plank Road Co. v. Payne*, 15 N. Y. R. 583; See also *Butternuts &c. Turnpike Co. v. North*, 1 Hill, 518.)

Stockholders may be directors.—Whenever the whole number of stockholders in any plank road company or

turnpike road company shall not exceed the number of directors specified in the articles of association of such company, each stockholder shall be in fact and in law a director of such company, and in such case the stockholders shall constitute the board of directors, whatever may be their number, and a majority thereof shall form a quorum for the transaction of business. (*Laws 1857, ch. 202.*)

Articles of association, where to be filed.—Such articles of association shall not be filed in the office of the Secretary of State, until five per cent. on the amount of the stock subscribed thereto shall have been actually and in good faith paid in cash, to the directors named in such articles, nor until there is endorsed thereon, or annexed thereto, an affidavit made by at least three of the directors named in such article, that the amount of capital stock required by the first section has been subscribed, and that five per cent. on the amount has actually been paid in. (*Laws 1847, ch. 210, § 2.*)

Five per cent.—This section does not require that each subscriber shall pay five per cent. upon his subscription for stock before the articles are filed; but only that a sum equal to five per cent. on the gross amount of the subscription shall be paid. (*Eastern Plank Road Co. v. Vaughan, 17 N. Y. R. 546; Rensselaer &c. Plank Road Co. v. Barton, 16 N. Y. R. 457, note.*)

Proof of incorporation, &c.—A copy of any article of association filed in pursuance of this act, with a copy of the affidavit aforesaid endorsed thereon or annexed thereto, and certified to be a copy by the Secretary of this State or his deputy, shall in all courts and places be presumptive evidence of the incorporation of such com-

pany, and of the facts therein stated. (*Laws* 1847, *ch.* 210, § 3.)

Where a duly certified copy of the articles of association and affidavits required are used as evidence, other evidence that the payment of the five per cent. was made in good faith and in cash prior to the filing of the articles is not required, unless something to the contrary is proved.

Want of legal organization not to work forfeiture.—Every company formed or organized under the act entitled “an act for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads, passed May 7, 1847;” and the several acts amending the same shall be deemed to be a valid corporation, although such company may not have complied with the requirements of such act in the formation and organization of such company, preparatory to the construction of its road, and no act or omission on the part of any such company, or of its corporate powers or franchises, unless the same was willful and malicious; but this section shall not affect or impair any right of action heretofore accrued. (*Laws* 1854, *ch.* 87, § 6.)

Liability of stockholders.—The stockholders of every company incorporated under this act shall be liable, in their individual capacity, for the payment of the debts of such company, for an amount equal to the amount of the stock they severally have subscribed or held in such company, over and above such stock, to be recovered of the stockholder who is such when the debt is contracted, or of any subsequent stockholder; and any stockholder who may have paid any demand against such company, either voluntarily or by compulsion, shall have a right to resort to the rest of the stockholders who were liable to contribution; and the dissolution of any company shall not release

or affect the liability of any stockholder which may have been incurred before such dissolution. (*Laws* 1847, *ch.* 210, § 44.)

Debts and liabilities.—The debts and liabilities of any company, under this act, shall not exceed in amount, at any one time, fifty per cent of the amount of its capital actually paid in, and if such debts and liabilities shall at any time exceed such amount, the stockholders who were such at the time any excess of debts or liabilities shall be created or incurred, shall be jointly and severally individually liable for such excess, in addition to their other individual liability, as provided in this act. (*Laws* 1847, *ch.* 210, § 45.)

2. MANAGEMENT OF COMPANY.

Board of directors.—The business and property of such company shall be managed and conducted by a board of directors, consisting of not less than five nor more than nine, who, after the first year, shall be elected at such time and place as shall be directed by the by-laws of such corporation, and public notice shall be given of the time and place of holding such election, not less than twenty days previous thereto, in a newspaper printed in each county in or through which the road of such company is located. The election shall be made by such of the stockholders as shall attend for that purpose, either in person or by proxy. All elections shall be by ballot; and each stockholder shall be entitled to as many votes as he shall own shares of stock; and the persons having the greatest number of votes shall be directors. Whenever any vacancy shall happen in the board of directors, such vacancy shall be filled for the remainder of the year by the remaining directors. The directors shall hold their office for one year, and until others are elected in their places. No

person shall be a director unless he is a stockholder in the company; and no stockholder shall be permitted to vote at any election for directors on any stock except such as he has owned for the thirty days next previous to the election. (*Laws* 1847, *ch.* 210, § 38.)

Stockholders may be directors.—Whenever the whole number of stockholders, in any plank road company or turnpike road company shall not exceed the number of directors specified in the articles of association of such company, each stockholder shall be in fact and in law a director of such company, and in such case the stockholders shall constitute the board of directors, whatever may be their number, and a majority thereof shall form a quorum for the transaction of business. (*Laws* 1857, *ch.* 202.)

By section 47 of the act of 1847, chapter 210, the following sections of the Revised Statutes are made applicable to companies formed under this act:

Annual Election.—An election for directors shall thereafter be annually held, on the same day of the same month on which the first election was held; and at each election, including the first, the stockholders present, by a plurality of votes, shall elect by ballot three persons to preside at the next succeeding election. (1 *R. S.* 578, § 7.)

How if not held.—If an annual election shall not be held on the day fixed by law, it shall be held in the same manner and with like effect, on some early day, to be appointed by the directors then in office, who shall give and publish the same notice thereof, as is required in respect to the first election; and who, after the day on which such election ought to have been held, shall be incapacitated from doing any act as directors, except such as may be necessary to give effect to the election so to be appointed. (*Id.* § 8.)

Duty of presiding officer.—The persons presiding at each election shall, immediately after receiving the ballots, openly estimate the votes, and thereupon make and subscribe a certificate of the result. Of the first election they shall make a return to the directors chosen, at their first meeting thereafter. (*Id.* § 9.)

Quorum.—Five directors shall be a board for the transaction of business, and the acts of a majority of the board shall bind the corporation. (*Id.* § 11.)

Vacancies.—The board shall supply every vacancy that may occur in the office of director, and the person chosen shall hold his office until the next annual election. They shall also supply from the directors every vacancy that shall occur in the office of president, and one of the number present shall be chosen, by a plurality of votes, to preside at every meeting of the board from which the president shall be absent. (1 *R. S.* 579, § 13.)

Duties and powers of directors.—The president and directors shall have power, and it shall be their duty;

1. To meet from time to time, at such place as they may deem expedient:

2. To make such by-laws rules and regulations, as in their judgment the affairs of the corporation shall require:

3. To appoint such subordinate officers, artists and workmen as they shall deem necessary to execute the business of the corporation:

4. To continue to receive subscriptions of shares, until their whole capital stock shall be subscribed, unless it shall have been ascertained that a less sum will be sufficient to fulfill the ends of the incorporation:

5. To demand at such time and in such proportion as they shall see fit, from the respective stockholders, the

sums of money due on their respective shares, under pain of the forfeiture of such shares, and of all previous payments thereon, to the corporation:

6. To declare, by a by-law, in what manner, and under what restrictions, the shares of their capital stock shall be transferable:

7. To construct complete, and keep in constant repair, the road, with all the necessary building and appurtenances, for the making of which they shall be incorporated:

8. To keep a fair and just account of all tolls received, and of all moneys disbursed, and deducting costs and charges, to make and declare a dividend of the clear profits and income of the road, among the stockholders, on the first Tuesday of May and the first Tuesday of November, in every year:

9. To publish a notice of each dividend, in one or more of the public newspapers printed nearest to the route of the road, and of the time and place of the payment thereof, and to pay the same accordingly:

10. To report to the comptroller, within six months after the road shall be completed, an account of the expenses of its construction, and to exhibit annually to the comptroller, an account of the sums arising from the tolls, of the disbursements and of the dividends actually made within the year. (1 R. S. 579, § 14.)

No company organized under the act entitled, "An act for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads," passed May seventh, eighteen hundred and forty-seven, and the several acts amending the same, shall be deemed to have forfeited any of its corporate powers or franchises by reason of the omission of the inspectors of election for directors in any such company to take the oath prescribed, prior to holding said election. (*Id.* § 6.)

Calls on stock.—The directors of any company incorporated under this act may require payment of the sums subscribed to the capital stock, at such times, and in such proportions, and on such conditions as they shall see fit; under the penalty of the forfeiture of their stock and all previous payments thereon; and they shall give notice of the payment thus required, and of the place and time, when and where the same are to be made, at least thirty days previous to the payment of the same, in one newspaper printed in each county in or through which their road is located, or by sending such notice to such stockholder by mail, directed to him at his usual place of residence. (*Laws 1847, ch. 210, § 39.*)

Shares transferable.—The shares of any company formed under this act, shall be deemed personal property, and may be transferred as shall be prescribed by the by-laws of such company. The directors of every such company may, at any time, with the consent of a majority in amount, of the stockholders in such company, provide for such increase of the capital stock of such company as may be necessary to finish the making of the road actually commenced and partly constructed, but the whole capital stock of any company shall not exceed five thousand dollars per mile for each mile of the road. (*Laws 1847, ch. 210, § 40.*)

Annual report.—It shall be the duty of the directors of every company formed under this act, to report annually, to the Secretary of State, under the oath of any two of such directors, the cost of their road, the amount of all money expended, the amount of their capital stock, and how much actually expended on such road; the amount received during the year for tolls, and from other sources, stating each separately, the amount of dividends made,

and the amount set apart for a reparation fund, and the amount of indebtedness of such company, specifying the objects for which the indebtedness accrued. (*Id.* § 41.)

Office of company to be located.—Within two weeks after the formation of any company, by virtue of this act, the directors thereof shall designate some place within a county in which, according to the articles of association of such company, its road, or some part thereof, is to be constructed, as the office of such company; and shall give public notice thereof, by publishing the same in a public newspaper, published in such county, which publication shall be continued once in each week, for three successive weeks, and shall file a copy of such notice in the office of the county clerk of every county in which any part of such road is constructed or is to be constructed. And if the place of such office shall be changed, like notice of such change shall be published and filed as aforesaid, before it shall take place, in which notice the time of making the change shall be specified. And every notice, summons, declaration, or other paper required by law to be served on such company, may be served by leaving the same at such office with any person having charge thereof, at any time between nine o'clock in the forenoon and noon, and between two and five o'clock in the afternoon, of any day except Sunday. (*Id.* 42.)

List of stockholders to be recorded.—It shall be the duty of the directors of any such company to cause a book to be kept by the secretary, treasurer or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall, within six years, have been, stockholders of such company, and showing their places of residence, the number of shares of stock held by them respectively, and the time when they respectively became the holders of

such shares; which book shall, from nine o'clock in the forenoon until noon, and from two o'clock in the afternoon until five, on every day except Sunday and the fourth day of July, be open for the inspection of all persons who may desire to examine the same, at the office of such company, and any and every person shall have a right to make extracts from such book; and no transfer of stock shall be valid for any purpose whatever, except to render the person to whom it shall be transferred liable for the debts of the company, according to the provisions of this act, until it shall have been entered therein, as required by this section, by an entry showing to and from whom transferred, Such book shall be presumptive evidence of the facts therein stated, in favor of the plaintiff in any suit or proceeding against such company, or against any one or more stockholders, or against such company and one or more stockholders jointly. Every officer or agent of any such company who shall neglect to make any proper entry in such book, or shall refuse or neglect to exhibit the same, or show the same to be inspected and extracts taken therefrom, as provided by this section, shall be deemed guilty of a misdemeanor, and the company shall forfeit and pay to the party injured, a penalty of fifty dollars for every such neglect or refusal, and all the damages resulting therefrom. And every company that shall neglect to keep such a book open for inspection as aforesaid, shall forfeit to the people the sum of fifty dollars for every day it shall so neglect, to be sued for and recovered in the name of the people, by the district attorney of any county in or through which the road of such company shall be constructed, or shall be according to its articles of association, intended to be constructed, and when so recovered the amount shall be paid in equal portions to every county, for the use thereof. (*Laws*, 1847, ch. 210, § 43.)

Treasurer to prepare annual statement.—The treasurer of every plank road company and turnpike company shall, at the end of each fiscal year of said company, make and prepare, under oath, a statement of the affairs of said company, in which he shall state the amount received by said company during the year, and from what sources the same was received, stating the amount received from each source separately; and also the amount expended during the year, and on what account the expenditures were made, and the items of said expenditures, and shall also state the amount of liabilities of said company, and amount of indebtedness to said company. Which statement he shall exhibit, at all seasonable hours, to any stockholder in said company, on being requested so to do, and in case such treasurer shall refuse to exhibit such account or statement as aforesaid, to any stockholder, on request as aforesaid, he shall forfeit, and pay to the person making such request, the sum of five dollars for each offence, to be recovered in any court having cognizance thereof. (*Laws 1855, ch. 546, § 8.*)

3. APPLICATION TO SUPERVISORS FOR LEAVE TO CONSTRUCT ROAD.

Whenever any such company shall be desirous to construct a plank road or turnpike road, through any part of any county, it shall make application to the board of supervisors of such county, at any meeting thereof legally held, for authority to lay out and construct such road, and to take the real estate necessary for such purpose; and the application shall set forth the route and character of the proposed road, as the same shall have been described in the articles of association filed as aforesaid. Public notice of the application shall be given, by the company, previous to presenting the same to such board, by publishing such notice, once in each week for six successive weeks,

in all the public newspapers printed in such county, or in three of such newspapers, if more than three are published in such county, which notice shall specify the time when such application will be presented to such board, the character of the proposed road, and each town, city and village in or through which it is proposed to construct the same. (*Laws 1847, ch. 210, § 4.*)

Special meetings how called.—If such company shall desire a special meeting of the board of supervisors for hearing the same, any three members of such board may fix the time of such meeting, and a notice thereof shall be served on each of the other supervisors of the county, by delivering the same to him personally, or by leaving it at his place of residence, at least twenty days before the day appointed for such meeting. The expenses of such special meeting, and of notifying the members of such board thereof, shall be paid by such company. (*Id.* § 5.)

Owners of land may be heard.—Upon the hearing of the said application, all persons residing in such county, or owning real estate in any of the towns through which it is proposed to construct such road, may appear and be heard in respect thereto. Such board may take testimony in respect to such application, or may authorize it to be taken by any judicial officer of such county, and it may adjourn the hearing from time to time. (*Id.* § 6.)

Assent of supervisors.—If, after hearing such application, such board shall be of the opinion that the public interests will be promoted by the construction of such road, on the proposed route, as shall be described in the application, it may, if a majority of all the members elected to such board shall assent thereto, by an order to

be entered in its minutes, authorize such company to construct such a road upon the route, specified in the application, and to take the real estate necessary to be used for that purpose; a copy of which order, certified by the clerk of such board, the said company shall cause to be recorded in the clerk's office of such county, before it shall proceed to do any act by virtue thereof. (*Id.* § 7.)

4. COMMISSIONERS TO BE APPOINTED TO LAY OUT.

Whenever any such board shall grant such an application, it shall appoint three disinterested persons, who are not the owners of real estate in any town through which such road shall be proposed to be constructed, or in any town adjoining such town; commissioners to lay out such road; the said commissioners after taking the oath prescribed by the constitution, shall proceed without unnecessary delay to lay out the route of such road, in such manner as in their opinion will best promote the public interest; they shall hear all persons interested who shall apply to them to be heard; they may take testimony in relation thereto; they shall cause an accurate survey and description to be made of such route and of the land necessary to be taken by such company for the construction of such road, and the necessary buildings and gates, they shall subscribe such survey and acknowledge its execution as the execution of deeds is required to be acknowledged in order that they may be recorded, and they shall cause such survey to be recorded in the clerk's office of such county. If such company shall intend to construct its road continuously in or through more than one county, such application shall specify the number of commissioners which the company desire to have appointed to lay out such road, which shall not exceed three for each county, and an equal number of such commissioners shall be appointed by the board of supervisors of each county in or through which it shall

be proposed to construct such road; but the whole number of such commissioners shall not be less than three, nor without the consent of such company shall it exceed six, unless the number of counties in or through which it is proposed to construct such road shall exceed that number. And the commissioners so appointed shall lay out the whole of such road, and shall make out a separate survey of so much thereof as lies in each county, which shall be subscribed and acknowledged as aforesaid, and recorded in the county clerk's office of such county. Such company shall pay each of the said commissioners two dollars for every day spent by him in the performance of his duties as such commissioner, and his necessary expenses. (*Laws* 1847, *ch.* 210, § 8.)

Commissioners to determine width.—The commissioners appointed by the board of supervisors, as provided in the eighth section of the act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads, passed May 7th, 1847, are hereby authorized in laying out a plank road, to determine the distance that the outer limits of the road shall be apart, as they may judge necessary, provided, in no case shall the company take more than four rods in width, except by the voluntary sale of the same to the company. (*Laws* 1848, *ch.* 360, § 1.)

5. LANDS, HOW TO BE PROCURED.

Lands, how to be procured.—Any company formed under the provisions of chapter 210 of the laws of 1847, entitled "An act to provide for the incorporation of companies to construct plank roads and companies to construct turnpike roads," may procure by purchase or gift from the owners thereof, any lands necessary for the construction

of so much of its contemplated road as shall be intended to be constructed in any county. They may also procure by agreement from the officers named in the 26th section of said chapter, the right to take and use any part of any public highway, necessary for the construction of so much of said road as shall be intended to be constructed in such county; and when any such company shall have procured all the lands necessary to be used for the construction of its road in such county, and the right to take and use such parts of the public highways in such county as shall be necessary for that purpose, such company may construct so much of its road as shall be intended to be constructed in such county, without making the application mentioned in the fourth section of the said chapter. (*Laws* 1847, *ch.* 398, § 1.)

Survey to be made.—Before proceeding to construct such part of its road as provided in the first section of this act, such company shall cause an accurate survey of such part to be made by a practical surveyor, signed by its president and secretary, acknowledged by them as conveyances of real estate, are required to be acknowledged in order to be recorded, and recorded in the county clerk's office of such county. It shall also, before proceeding to construct such part of its road, procure in manner provided by the said chapter, from the board of supervisors of every other county, if any there be, in which any portion of its road is intended to be constructed, authority to construct the same through such other county; but in such case, the commissioners appointed to survey and lay out the road of such company, shall not be required to survey and lay out that portion of it intended to be constructed in the county, in which such company shall have procured the lands, and the right to take and use the public highways necessary for its construction as aforesaid. (*Id.* § 2.)

Where highways are used.—When any such company, by virtue of the provisions of this act, shall have procured the lands, and the right to take and use the parts of any highways necessary to construct its road in any county, and shall have constructed the same without making the application mentioned in the fourth section of the said chapter, it shall possess the same rights, powers and privileges, and be subject to the same duties and liabilities in respect to its road, and the part thereof so constructed, as if such application had been made, and all the proceedings of such company had been had, pursuant to the provisions of the said chapter. (*Id.* § 3.)

Saving clause.—Nothing in this act contained shall be deemed or construed to authorize the laying out or constructing of any road in the cases specified in section nine of chapter 210, of the laws of 1847, nor to authorize the bridging or obstructing of any stream navigable by vessels or steamboats. (*Id.* § 4.)

Through orchards, &c.—No such road shall be laid out through any orchard, to the injury or destruction of fruit trees, or through any garden, without the consent of the owner thereof, if such orchard be of the growth of four years or more, or if such garden has been cultivated four years or more before the laying out of such road, nor shall any such road be laid out through any dwelling house or buildings connected therewith, or any yards or enclosures necessary for the use and enjoyment of such dwelling, without the consent of the owner, nor shall any such company bridge any stream where the same is navigable by vessels or steamboats, or in any manner that will prevent or endanger the passage of any raft of twenty-five feet in width. (*Laws 1847, ch. 210, § 9.*)

The rules as to laying out turnpike road or plank road through orchard, gardens, yard, &c., are similar to those in cases of ordinary highways. (See *ante ch. VIII.*)

Roadway of turnpike.—No plank road shall be made on the roadway of any turnpike company, without the consent of such company, and any plank road company formed under this act, shall have power to contract with any turnpike company connected therewith, for the purchase of the roadway or part of the roadway, or the stock of such turnpike company, on such terms as may be mutually agreed upon; and in case the purchase of such stock of such turnpike road company, such stock shall be held by such plank road company for the benefit of the stockholders of such plank road company, in proportion to the amount of stock held by each stockholder in such plank road company at the time of such purchase, or at any time afterwards. Upon and after the purchase of the whole of the stock of such turnpike road company by such plank road company, the directors of such plank road company, for the time being, and their successors, shall be the sole directors of such turnpike road company, and shall manage the affairs thereof, pursuant to the charter of such turnpike road company, and shall render an account of the same annually to the stockholders of such plank road company. In case of a dissolution of such plank road company, the stockholders of such plank road company at the time of such dissolution, shall be the stockholders of such turnpike road company, in proportion to the amount of stock held by each in said plank road company; and, from thenceforward, the stock of such turnpike road company shall be deemed divided into shares equal in number to the shares of stock of such late plank road company, and scrip therefor shall be issued accordingly to each of the last stockholders of such plank road

company; whereupon the officers of such turnpike road company shall be the same in number and power, as provided for in the charter of such turnpike road company, and shall be chosen by such former stockholders of such plank road company or their assigns, each share of stock as above provided for, entitling the holder thereof to one vote. After such purchase of the stock of such turnpike road company, and prior to the dissolution of such plank road company, the assignment of stock in said plank road company shall carry with it its proportional amount of the stock in such turnpike road company, and entitle the holder thereof to his share of the dividends derived from such turnpike road. Whenever a plank road shall be made as provided in this act, on or adjoining a route of any turnpike road, the company owning such turnpike road is authorized to abandon that portion of their road on or adjoining the route of which a plank road is actually constructed and used; but nothing herein contained shall be so construed as to prevent any plank road from crossing any turnpike road, nor any turnpike road from crossing any plank road. (*Laws 1847, ch. 210, § 10, as amended 1857, ch. 643.*)

Company may take possession.—The route so laid out and surveyed by the said commissioners shall be the route of such road, and such company may enter upon, take and hold, subject to the provisions of this act, all such lands as the said survey shall describe as being necessary for the construction of such road and the necessary buildings and gates. But before entering upon any of such lands the company shall purchase the same of the owners thereof, or shall, pursuant to the provisions of this act acquire the right to enter upon, take and hold the same. (*Laws 1847, ch. 210, § 11.*)

Where land cannot be purchased.—If any owner of such land shall, from any cause, be incapable of selling the same, or if such company can not agree with him for the purchase thereof, or if after diligent inquiry the name or residence of any such owner cannot be ascertained, the company may present to the first judge or county judge of the county in which the lands of such owner lie, a petition, setting forth the grounds of the application, a description of the lands in question, and the name of the owner, if known, and the means that have been taken to ascertain the name and residence of such owner, if his name and residence have not been ascertained, and praying that the compensation and damages of the owner of the lands described in the petition may be ascertained by a jury. Such petition shall be verified by the oath of at least two of the directors of the company, and if it shall allege that the name or residence of any owner is unknown, it shall be accompanied by affidavits proving to the satisfaction of the said judge that all reasonable efforts have been made by the company to ascertain the name and residence of any owner whose name or residence is unknown. (*Id.* § 12.)

Case to be submitted to jury.—On receiving such petition, the said judge shall appoint a time for drawing such jury, which shall be drawn from the grand jury box of the county by the clerk thereof, at his office. At least fourteen days' notice of the time and place of such drawing shall be served personally upon each owner of lands described in the petition, who shall be known and reside in the county where the lands lie, or by leaving the same at his residence, and such notice shall be served on all other owners in the manner aforesaid, or by putting the same in the post office directed to them at their respective places of residence, and paying the postage thereon, or by

publishing the same once in each week for two successive weeks in a newspaper printed in such county, the first of which publications shall be at least fourteen days before such drawing. (*Laws 1847, ch. 210, § 13.*)

In case of married women, infants, &c.—In case any lands described in such petition shall be owned by a married woman, infant, idiot or insane person, or by a non-resident of the state, the said judge shall appoint some competent and suitable person, having no interest adverse to such owner, to take care of the interests of such owner in respect to the proceeding to ascertain such compensation and damages. And all such notices as are required to be served on any owner residing in such county shall be served upon the person so appointed in like manner as on such owner; but any person so appointed to take care of the interests of any such non-residents, may be superseded by him. (*Id. § 14.*)

Duty of judge.—The said judge shall attend such drawing and shall decide upon any challenge made to any juror drawn by any person interested. Twenty-four competent and disinterested jurors, and as many more as the said judge shall direct, shall be drawn; the clerk shall make, certify and deliver to the judge, and to any party requiring the same, a list of them, and the ballots drawn shall be returned to the box. The said judge, if he shall deem it necessary, may at any subsequent time direct the drawing of an additional number of jurors, and they shall be drawn, and all proceedings in relation to such drawing shall be had in the manner hereinbefore provided. Before proceeding to draw any such jury the company shall furnish to the said judge proof, by affidavit, satisfactory to him, of the time and manner of serving and publishing notice of such drawing, which affidavit shall be

filed in such clerk's office; and no such jury shall be drawn unless it shall appear to the satisfaction of the said judge that the provisions of this act in respect to giving notice of such drawing have been complied with. (*Id.* § 15.)

Jurors to be drawn.—From the jurors to draw the said judge shall draw as many as he shall deem necessary to secure the attendance of twelve; and he shall issue his precept, directed to the sheriff of such county, either of his deputies, or any constable of such county, to summon the jurors so drawn by the said judge, to attend at the time and place therein specified, to ascertain such compensation and damages. And he may, from time to time, in case of the absence or inability to serve of any juror directed to be summoned, draw and direct to be summoned as aforesaid, as many as may be necessary in his opinion to secure the attendance of twelve.—(§ 16.)

Jurors when and how summoned.—Every juror named in any such precept shall, at least four days before the day therein specified for his attendance, be summoned personally, or by leaving at his residence, a notice containing the substance of such precept. The officer serving such precept shall return it to the said judge, with an affidavit of the manner of serving the same, and of the distance necessarily traveled by him for that purpose: and such officer shall receive for making such service, six cents a mile for the distance so traveled. (*Id.* § 17.)

Penalty for neglect.—Every juror so summoned, who shall neglect or refuse to attend or serve, in pursuance of such summons, shall be liable to the same penalties as in case of such neglect or refusal of a person duly summoned as a juror in a court of record, and may be excused by the said judge from attending or serving for reasons for which

such juror might be so excused if summoned as a juror in such court. Every juror attending shall be entitled therefor to one dollar a day, and his reasonable and necessary expenses, to be paid by the company. (*Id.* § 18.)

Subpoenaing witnesses.—On the application of any party interested, any judge or justice of the peace may issue a subpoena requiring witnesses to attend before such jury, and such subpoena shall have the same force and effect; and witnesses duly subpoenaed by virtue thereof, and refusing or neglecting to obey the same, shall be subject to the same penalties and liabilities as though the subpoena were issued from a court of record, in a suit pending therein. (*Id.* § 19.)

Notice to owners of land.—The time and place of meeting of the jury, to ascertain such compensation and damages, may be fixed by the said judge, by an order to be made by him at any time after receiving such petition; and notice thereof shall be served on the owners whose lands are described in the petition, as follows: on any owner residing in the county, or within fifteen miles of the lands in question owned by him, personally, or by leaving the same at his residence, at least fourteen days before the time so fixed; on any other owner residing within this state, and whose residence is known, in the manner aforesaid, or by putting the notice into the post-office, directed to him at his place of residence, and paying the postage thereon: on any owner residing out of the state, and not within fifteen miles of the lands in question, owned by him, by putting the notice in the post-office, directed and paid as aforesaid, at least forty days before the time so fixed; and on owners whose residence is unknown, by publishing the notice once in each week, for six successive weeks, in one of the public newspapers printed in the county. (*Id.* § 20.)

Duty of Jury.—The jurors so summoned, shall meet at the time and place fixed by the said judge for that purpose, and shall be sworn by him to diligently inquire and ascertain the compensation and damages which ought justly to be paid for the lands described in the petition, or for those of them in respect to which they shall be called upon to inquire, to the owners thereof, and for taking the same for such road, and faithfully to perform their duty as such jurors, according to law. (*Id.* § 21.)

Duty of Judge.—The said judge shall attend such jurors, shall administer oaths to witnesses called before them, shall take minutes of the testimony given, and admissions of the parties made before them, shall advise such jury as to the law applicable to any case that may arise, shall receive, certify and return to the county clerk's office the verdicts agreed upon by them, and while so attending, shall have all the powers possessed by a court of record when trying issues of fact joined in civil cases. (*Id.* § 23.)

Damages.—The jury, after hearing the parties, and viewing the lands in question, in each case, shall, by a verdict, ascertain and determine the compensation and damages that ought to be paid to the owner for the land, to be taken by the company, and for taking the same for such road, and also the amount that ought to be paid to him for the time spent, and necessary expenses incurred by him in respect to the proceedings, to ascertain and determine such compensation and damages, of which time and expenses a bill of items shall be presented to the jury, verified by the oath of the owner or his agent, and such compensation and damages shall be ascertained and determined without any deduction on account of any real or supposed benefit which the owners of such lands may derive from the construction of such road. (*Id.* § 23.)

Proof of notice.—Such jury shall not proceed to a hearing in any case until the company shall have produced to the said judge, satisfactory proof by affidavit, that the notice of the meeting of the jury has been given in such case, according to the provisions of this act; and such affidavit shall be attached to and filed with the certificate of the verdict in the case. And on any such hearing, no evidence or information shall be given, nor any statement made to the jury, of any proposition by, or negotiation between the parties or their agents, in respect to any such lands, or such compensation or damages, nor shall any such petition contain any such statement or information. (*Id.* § 24.)

Jury to make certificate.—Such jury, finding any such verdict, shall, after agreeing upon the same, make a certificate thereof, and sign and deliver the same to the said judge; and shall embrace therein a particular description of the land, in respect to which it is found. Such certificate may include one or more verdicts, in the discretion of the jury. Every such certificate shall be certified by the judge to have been made by such jury, and shall be recorded in the records of deeds in the clerk's office of the county where the lands therein described shall lie, at the expense of the company. (*Id.* § 25.)

New trial may be applied for.—Any party interested in any such verdict may, within twenty days after being notified of the rendition thereof, apply to the Supreme Court for a new trial, and it may be granted upon such terms as to the costs of the application and of the first trial, as that court shall deem reasonable. If a new trial shall be granted, a jury shall be drawn therefor, and the same proceedings shall be had as are hereinbefore provided. (*Laws 1847, ch. 210, § 27.*)

Money when to be paid.—Within forty days after the rendition of any such verdict, if a new trial shall not be applied for, the company shall pay to the person entitled to receive the same, the amount thereof, or shall make a legal tender thereof to him, if he shall refuse to receive the same; and the company may thereupon enter upon the lands in respect to which such verdict was rendered, and take and hold the same to it and its assigns, so long as it shall be used for the purposes of such a road as such company was formed to construct. (*Id.* § 28.)

Provision in case of non-residents.—If any person entitled to receive the amount of any such verdict be not a resident of this state, or cannot be found therein after diligent search, the company may furnish to the said judge satisfactory proof, by affidavit, of such fact, and he shall thereupon make an order that the amount of such verdict be paid to the treasurer of the county in which the lands lie, in respect to which such verdict was found, for the use of such owner, and that notice of such payment shall be given by publishing the same once in each week, for six successive weeks, in a newspaper published in the county. On satisfactory proof being made to the said judge, by affidavit, within three months from the time of making the last mentioned order, of such payment and publication, he shall make an order authorizing the company to take and hold the land in respect to which such verdict was rendered, in the same manner and with the same effect as if such payment had been made to the owner personally. The affidavit and orders mentioned in this section, and all other affidavits and orders made, and precepts issued in the course of the proceedings under this act, in relation to the acquisition of the land to be used for such road, shall be filed in the county clerk's office, and all such orders shall be recorded by such clerk in the

records of deeds, at the expense of the company. (*Id.* § 29.)

When money may be deposited.—If any owner shall apply for a new trial, the company, upon depositing the amount of the verdict sought to be set aside, in such manner as the said judge shall, upon hearing the parties, direct, in trust that the same, or so much thereof as the said owner shall be entitled to receive, shall be paid to him on demand, and on giving such security, by bond, as judge shall approve, for the payment to such owner of any sum which he may be entitled to receive from the company, in respect to the land in question, by reason of any verdict or the judgment of any court, for such compensation, damages, costs and expenses, the company may enter upon and use such lands for the purposes of such road, but the title of the owner thereof shall not be divested until the payment or legal tender to him of the whole amount which he shall be entitled to receive from the company for such compensation, damages, costs and expenses; and on such payment or tender being made, the company shall be entitled to take and to hold such lands to it and to its assigns, so long as the same shall be used for the purposes of such road as such company was formed to construct. (*Id.* § 30.)

6. PROVISIONS IN CASE OF USING HIGHWAY.

Whenever it shall become necessary for any such company to use any part of a public highway for the construction of a plank or turnpike road, the supervisors and commissioners of highway of the town in which such highway is situated, or a majority, if there be more than one such commissioner in such town, may agree with such company upon the compensation and damages to be paid by said company, for taking and using said highway for the pur-

pose aforesaid. Such agreement shall be in writing, and shall be filed and recorded in the town clerk's office of such town. In case such agreement cannot be made, the compensation and damages for taking such highway for such purpose, shall be ascertained in the same manner as the compensation and damages for taking the property of individuals. Such compensation and damages shall be paid to the said commissioners, to be expended by them in improving the highways of such town. (*Laws* 1847, ch. 210, § 26.)

If a plank road or turnpike company take possession of a highway, before making compensation therefor, the commissioners of highways have no action for damages. They should proceed, by indictment, for a nuisance or summary removal, or, by action, for the treble damages given by 1 *R. S.* 526, § 130; *Cornell v. Butternuts Turnpike Co.* 25 *Wend.* 365.

When a plank road or turnpike is constructed along a highway, the company succeed to the rights and powers of the commissioners of highways, and any inconvenience or damage which an owner of land suffers by proper and reasonable repairs or improvements of the highway, is *damnum absque injuria*. (*Benedict v. Goit*, 3 *Barb.* 459; *Dexter v. Broat*, 16 *Barb.* 337.) But such company have no right to exclude the public from the highway, or to interrupt their enjoyment of their right of way, while the change is going on. They are bound, like town officers engaged in repairing roads, to carry on the work with as little inconvenience to the public as is reasonably practicable; and if, through their neglect, a person passing with ordinary care and prudence suffers damage, the company are liable. (*Ireland v. Oswego &c. Plank Road Co.* 13 *N. Y. R.* 526.)

. Where a plank road company takes and uses a public highway for its purposes, the road thus appropriated does

not cease to be a public highway. The general right of the public to use it for the purpose of travel, with horses, carriages and on foot, remain unimpaired. The change effected by said act is, the general public, in consideration of the payment of certain tolls, is relieved from the burden of keeping it in repair, and the duties which, in this respect, before belonged to the commissioners of highways and other local officers, is transferred to the plank road corporation. But the local authorities are not thereby ousted of their jurisdiction in respect to encroachments upon highways thus used by plank roads. (*Walker v. Caywood*, 31 *N. Y. R.* 51.)

The above provision authorizes the supervisor of the town and commissioners of highways, to agree with the turnpike or plank road company upon the compensation and damages to be paid for taking and using a highway. The consideration must be a *pecuniary* compensation and damages to be paid to the commissioners, for the improvement of roads. It does not authorize those officers to release and grant to the company the public right to a highway, without a pecuniary consideration, nor to convey such public right upon conditions. Thus, where the right to take and use a highway for the construction of a plank road, was granted, *in consideration of the public benefit to result therefrom*, and upon conditions that no gate should be erected or tolls demanded on such road, within three miles of a certain point, and the company, after taking possession of the highway under the agreement, proceeded in violation of such agreement, to erect such toll-gates within the prescribed limits, and an action was brought to compel the company to perform it; it was held, that the action would not lie. (*Palmer v. Fort Plain &c. Plank Road Co.* 11 *N. Y. R.* 376.)

But when the company, in consideration of the right to take and use forever the highway, agreed to keep the

road and all bridges in good repair, according to law, without expense to the town, it was held not to be void for excess of authority by the commissioners; such officers are not limited to a money compensation, but a consideration inuring to the benefit of the highways is sufficient. (*Fishkill v. Fishkill &c. Plank Road Co.* 22 Barb. 634; *People v. Fishkill &c. Plank Road Co.* 27 Barb. 445.)

Under an agreement with the supervisor and commissioners, the company acquire nothing more than an easement in the land. (*Northern Turnpike Co. v. Smith*, 15 Barb. 355.)

The supervisor and commissioners cannot make the agreement as above provided, without the plank road or turnpike company shall first have obtained the consent in writing of at least two-thirds of all the owners of land along such highway, who shall actually reside on that part of the highway on which such plank road or turnpike road is to be constructed. (*Laws 1850, ch. 71, § 5.*)

After such turnpike or plank road company has procured by agreement from such supervisor and commissioners of the town, the right to take and use any part of the highway necessary for the construction of their road, such company may proceed to construct its road on such highway, without making application to the board of supervisors as was required by section 4, of chapter 210, of the Laws of 1847. (*Laws 1847, ch. 398, § 1.*)

Agreement with commissioners.—Every instrument in writing, purporting to be an agreement between any plank road company and the supervisor or commissioners of highways of any town, in pursuance to section twenty-six of chapter two hundred and ten of the session laws of eighteen hundred and forty-seven, and heretofore filed or recorded in any town clerk's office, shall be deemed, and taken in all courts and places to be as valid and effectual

an agreement as if the same had been made and executed at a regular meeting of such supervisor and commissioner or commissioners of highways. The provisions of this section shall not affect suits now commenced. (*Laws* 1855, *ch.* 546, § 3.)

Highway, labor on.—Whenever any plank road or turnpike road shall be built in pursuance of the provisions of this act, or the act hereby amended, upon the site of an old highway, it shall be the duty of the commissioners of the highways of the town where such road shall be made, to designate some district or districts within their town, on which the highway labor of the inhabitants residing along the line of said plank or turnpike road shall be performed. (*Laws* 1849, *ch.* 250, § 11.)

Grading Roads.—It shall be lawful for the inhabitants residing in any road district in this State, to grade, gravel or plank the road or roads in such district, by anticipating the highway labor of such road district for one or more years, and applying it to the immediate construction of such plank or gravel road, and after the completion of such plank or gravel road, the said inhabitants shall be exempted from the labor so anticipated and applied, except so far as their labor may be necessary to keep their said road or roads in repair; such road to be in all cases free road. (*Id.* § 12.)

Highway labor how assessed.—Every person liable to do highway labor, living or owning property on the line of any plank road of this State, may, on making application in writing to the commissioner or commissioners of their respective towns, on or any day previous to the time of making the highway warrants by such commissioners, be assessed the apportionment of highway labor for such

property upon such plank road; and the commissioner or commissioners shall assess such person for the land or property owned by him in or upon the line of said plank road, as a separate road district. (*Laws* 1853, *ch.* 626.)

Duty of highway commissioners.—It shall be the duty of the highway commissioner or commissioners of such town, to make a separate list of such persons, and such land or property so assessed, as commissioners are now by law required to make for every separate road district, which shall be delivered to some one of the directors of such road, who shall proceed to have said highway labor worked on such road, in the same manner that overseers of highways are required by law to do. (*Id.* § 2.)

Power of directors.—The said directors shall possess all the powers and have the same authority to compel the performance of such highway labor, or the payment of such highway tax, as the overseers of highways now have by law, and shall make like return to the commissioners of highways. (*Id.* § 3.)

May commute.—Any person so assessed may commute for the tax assessed upon him or his property, by paying the sum now fixed by law, to any of said directors. (*Id.* § 4.)

The court decided in the case of the *Buffalo Pl. R. Co.* (*How P. R.* 237), that this power conferred on the commissioners is *discretionary*; and that they cannot be compelled to exercise it.

When old road is taken.—The following section of the Revised Statutes relating to turnpike companies, is made applicable to plank road and turnpike companies organized under the act of 1847. (*Laws* 1847, *ch.* 210, § 47.)

“Whenever an appraisalment shall be made of the lands on any old road, used as such by prescription, on which a

turnpike shall be laid out, the appraisers shall set down the value of the soil and of the improvements, and the moneys paid by any town for making such improvements in separate sums; and the sum for which the soil is appraised shall be paid to the owners thereof, and the value of the improvements, and the sums paid therefor by any town shall be paid to the commissioner of highways of the town in which such old road shall be situate." (1 R. S. 584, § 30.)

7. CONSTRUCTION AND REPAIR OF ROADS.

Width of plank road.—Every plank road made by virtue of this act, shall be laid out at least four rods wide, and shall be so constructed as to make, secure and maintain, a smooth and permanent road, the track of which shall be made of timber, plank, or other hard material, so that the same shall form a hard and even surface, and be so constructed as to permit carriages and other vehicles conveniently and easily to pass each other, and also, so as to permit all carriages to pass on and off where such road is intersected by other roads. (*Laws 1847, ch. 210, § 31.*)

Width of turnpike roads.—Every turnpike road that shall be constructed by virtue of this act, shall be laid out at least four rods wide; and shall be bedded with stone, gravel, or such other material as may be found on the line thereof, and faced with broken stone or gravel, so as to form a hard and even surface, with good and sufficient ditches on each side, wherever the same is practicable. The arch or bed of such road shall be at least eighteen feet wide, and shall be so constructed as to permit carriages and other vehicles conveniently to pass each other, and to pass on and off such turnpike where it may be intersected by other roads. (*Id.* § 32.)

The inspectors, or a majority of them whose appointment is provided for by the thirty-third section of the said act, passed May 7, 1847, are hereby authorized to determine the distance that the outer limits shall be apart, of any plank road or any turnpike road belonging to any company formed under said act, in case the same has not been determined by the commissioners appointed under the eighth section of said act: *Provided*, That in no case shall the company take more than four rods in width, except by the voluntary sale of the same to the company. (*Laws* 1849, *ch.* 250, § 7.)

When a corporation organized to build a turnpike or plank road is required by its charter to cause its road to be laid out of a certain width, that is a condition which the corporation must perform to entitle it to a continuance of its franchise. The fact that it was laid out upon an ancient highway, furnishes no excuse for the omission to make it of the required width. (*People v. Fishkill &c. Plank Road Co.* 27 *Barb.* 445.)

The following sections of the Revised Statutes relating to turnpikes, are made applicable to companies formed under this act. (*Laws* 1847, *ch.* 210, § 47.)

Milestones.—A milestone or post shall be erected and maintained by the corporation on each mile of the road, on which shall be fairly and legibly marked or inscribed the distance of such stone or post from the place of the commencement of the road; and when such road shall commence at the end of any other road, having milestones or posts, on which the distance from any city or town is marked, a continuation of that distance shall in like manner be inscribed. (1 *R. S.* 582, § 21.)

Guide-posts—A guide-post shall also be erected at the intersection of every public road leading into or from the turnpike, on which shall be inscribed the name of the place to which such intersecting road leads, in the direction to which the name on the guide-post shall point. (*Id.* § 22.)

Directors not to be contractors.—No director of the corporation to which it shall belong, shall be concerned, directly or indirectly, in any contract for the making or working of the road, or any part thereof, during the time he shall be a director. (*Id.* § 23.)

A contract by a director or directors of a plank road company to build the road is void. (*Barton v. Port Jackson &c. Plank road*, 17 Barb. 397.)

No contractor, for the making of such road or any part thereof, shall make a new contract for the performance of his work or any part thereof, other than by hiring hands, teams, carriages or utensils, to be superintended and paid by himself, unless such new contract and its terms be laid before the board of directors, and be approved by them. (1 R. S. 582, § 24.)

Roads may be relaid with gravel, &c.—Any plank road or turnpike company within this State, which shall have once laid their road with plank, may hereafter relay the same, or any part thereof, with broken stone, gravel, shells or other hard material, whereby they keep a good and substantial road; such company shall be entitled to collect and receive the same tolls as is provided by chapter 245, of the laws of 1853. (*Laws* 1855, ch. 546, § 7.)

A turnpike or plank road company have a lawful right to repair their road in such a way as to prevent the effect of rains or freshets, but in the exercise of that right, they must not injure the owner of adjoining lands.

If a damage arises from their negligence in this respect, he may recover against them therefor. (*Boughton v. Car-*

ter, 18 John. 405.) But where a turnpike or plank road is constructed along a highway, the company succeed to the rights and powers of the highway commissioners, and any inconvenience or damage which an owner of lands sustains by proper and reasonable repairs or improvements of the highway, is *damnum absque injuria*. (*Benedict v. Goit*, 3 Barb. 459; *Dexter v. Broat*, 16 Barb. 337.)

When there is a failure on the part of a turnpike company to comply with an express requirement of the statute, either as to the width of the road, or the mode of its construction, and a person traveling over it sustains an injury in consequence of such omission, the turnpike company is liable, unless it appears that the plaintiff could have avoided the injury by the exercise of ordinary care and prudence. But if the plaintiff's injury was not chargeable to any such omission, the action is not sustainable. (*Wilson v. Susquehanna Turnpike Co.* 21 Barb. 68.)

A turnpike company is bound to exercise ordinary care and diligence in the construction and preservation of the bridges on the road, but is not liable for accidents not occasioned by want of such care and skill. (*Townsend v. Susquehanna Turnpike Co.* 6 John. 90; *Wilson v. Susquehanna Turnpike Co.* 21 Barb. 68.)

A turnpike road company is liable to an indictment, at common law, for suffering their road to be out of repair, notwithstanding that by the terms of its charter a specific penalty is provided, if the charter contains no negative words, nor anything from which it can be inferred that the legislature intended to take away the common law remedy. (*Susquehanna, &c. Turnpike Co. v. People*, 15 Wend. 267.)

The want of funds is no answer to the indictment, as it might be in the case of public officers. And under the indictment, the company may be punished for contracting its road within the limits prescribed by its charter, as a

nuisance. (*Waterford, &c. Turnpike Co. v. People*, 9 Barb. 161.)

The mode of prosecution contemplated by the act (1 R. S. 587, § 47), declaring that the corporation, if convicted for neglect to repair after notice, shall be fined—is by indictment. (*People v. Goshen, &c. Turnpike Road Co.* 11 Wend. 597.)

8. INSPECTORS TO BE APPOINTED.

In each county of this state, in which there shall be any plank road, or turnpike road, constructed by virtue of this act, there shall be three inspectors of such roads, who shall not be interested in any plank or turnpike road in such county. They shall be appointed by the board of supervisors of the county, and shall hold their office during the pleasure of such board. Before entering on their duties such inspectors shall take and subscribe the constitutional oath of office, and file the same in the office of the clerk of the county. (*Laws 1847, ch. 210, § 33.*)

To inspect roads, etc.—Whenever any such company shall have completed their road, or any five consecutive miles thereof, it may apply to any two of the inspectors to be appointed pursuant to this act, in the county where said road or a part thereof, so completed and to be inspected, is located, to inspect the same; or, if such inspectors or a majority of them are satisfied on inspection, that the road so inspected is made and completed according to the true intent and meaning of this act, they shall grant a certificate to that effect, which shall be filed in the office of the county clerk. The inspectors shall be allowed two dollars per day for their services, pursuant to this section, to be paid by the company whose road they inspect. (*Laws 1847, ch. 210, § 34.*)

To determine width.—The inspectors, or a majority of them, whose appointment is provided for by the thirty-third section of the said act, passed May 7th, 1847, are hereby authorized to determine the distance that the outer limits shall be apart, of any plank road, or any turnpike road, belonging to any company formed under said act, in case the same has not been determined by the commissioners appointed under the eighth section of said act; provided that in no case shall the company take more than four rods in width, except by the voluntary sale of the same to the company. (*Laws 1849, ch. 250, § 7.*)

When to receive fees.—Whenever a complaint shall be made to the inspector or inspectors of any plank road or turnpike in this State, before such inspector or inspectors shall act upon such complaint, he or they shall receive from the complainant, the fees provided by law; and in case it shall appear, upon examination of the road, that the complaint was well founded, the amount of said fees shall be paid to the complainant by the company. In case it is determined that the complaint was not well founded, the complainant shall not be entitled to receive back the fees so paid by him. (*Laws 1849, ch. 250, § 10.*)

The inspector's certificate must show what part of the road is meant, and that the miles are consecutive miles. (*Hammondsport &c. Plank Road v. Brundage, 13 How. 448.*)

The following provisions of the Revised Statute relating to turnpike roads are made applicable to plank and turnpike roads under this act. (*Laws 1847, ch. 40, § 47.*)

Duty of inspectors when roads are out of repair.—It shall be the duty of each inspector to whom a complaint in writing shall be made, that a turnpike road, or a part of such road in his county is out of repair, without

delay to view and examine the road complained of; and if he shall find such complaint to be just, he shall give notice in writing of the defect, to the toll gatherer, or person attending the gate nearest to each place out of repair, and in such notice may, in his discretion, order such gate to be thrown open; but no inspector or inspectors shall order such gate to be opened unless a notice in writing shall have been served on the gate keeper nearest to the place out of repair, particularly describing such place at least three days previous to making such order. (1 R. S. 586, § 41.)

The notice to the toll gatherer must point out the part complained of, or if the whole is intended, then say so in terms. (*Braden v. Berry*, 20 Wend. 55.)

Proceedings.—Immediately after the service of such notice, each gate ordered to be thrown open, shall be opened; nor shall it be again shut nor any toll be collected thereat until one of the inspectors for the county shall have granted a certificate that the road is in sufficient repair, and that such gate ought to be closed. (*Id.* § 42.)

Penalty for not opening gate.—Every keeper of a gate ordered to be thrown open, who shall not immediately obey such order, or who shall not keep open such gate until a certificate permitting it to be closed shall be granted, or who, during the time such gate ought to be open, shall hinder or delay any person in passing, or take or demand any toll from any person passing, shall, for each offence, forfeit the sum of ten dollars to the party aggrieved. (*Id.* § 44.)

When inspector to give notice.—It shall be the duty of each inspector, who, upon due examination, shall have discovered a turnpike road, within his county, to be out of

repair, or that any gate thereon is placed in a situation contrary to law, to give notice in writing of such defect or default, to one or more of the directors of the company to which such road shall belong. (*Id.* § 45.)

Contents of notice.—In such notice, he shall require the defective road to be repaired, or the gate improperly placed to be removed, within a certain time to be fixed in the notice; and, in his discretion, may order that in the meantime, the gates on such road, or such of them as he shall specify, be thrown open. (*Id.* § 46.)

Proceedings if not complied with.—If the requisition of such notice be not obeyed, it shall be the duty of such inspector to make immediate complaint to the attorney general, or the district attorney for the county, whose duty it shall be to prosecute the delinquent company, in the name of the people of this State. Such corporation, if convicted of having suffered their road to be out of repair, or having placed one or more of the gates thereon in a situation contrary to law, shall be fined in a sum not exceeding two hundred dollars. (*Id.* § 47.)

Compensation of inspectors.—To each inspector of turnpikes, who shall view a turnpike road upon complaint made to him, shall be allowed the sum of two dollars for each day spent by him in the performance of such duty. If he shall adjudge the road viewed to be out of repair, such fees shall be paid by the company to which the road shall belong; otherwise, they shall be paid by the party making the complaint. (*Id.* § 48.)

How paid.—Such fees, when payable by the company, shall be paid by the toll gatherer nearest the road adjudged out of repair, on demand and out of the tolls

received or to be received by him; and may be recovered, with costs, of such toll gatherer, if he shall neglect or refuse to make such payment. (*Id.* § 49.)

When inspectors appointed in other case.—There shall be appointed in the several counties of this State, in which there is or may be a turnpike road, whose act of incorporation contains no provision for protecting the public against the company taking toll when the road is out of order, not less than three nor more than five inspectors of turnpike roads. (*Laws* 1848, *ch.* 45, § 1.)

By whom appointed.—The said inspectors of turnpikes shall be appointed by the board of supervisors of the several counties, at any meeting thereof, and shall hold their offices for two years. (*Id.* § 2.)

Powers and duties.—The said inspectors of turnpikes, when appointed, shall possess the same powers, perform the same duties, receive the same compensation, and be subject to the same restrictions, penalties and liabilities in all respects, as is now provided by title one, article four, chapter eighteen, part one, of the Revised Statutes. (*Id.* § 3.)

9. ERECTION OF GATES.

Whenever any plank road company, formed under the before mentioned acts, shall have finished their road, or any mile thereof, and had the same inspected, as provided in the before mentioned act, it shall be lawful to erect a toll-gate thereon, and to exact toll thereat, at the rate in the said act provided. (*Laws* 1849, *ch.* 250, § 4, *as amended* 1865; see *Session Laws*, 1866, *p.* 18.)

It is provided by sections 35 and 36, of the act of 1847, chapter 210, which will be cited in full in the next sub-

division, that upon filing the inspectors' certificate, any plank road or turnpike company may erect one or more toll-gates upon their road.

No plank road or turnpike road company shall hereafter erect or put up any hoist-gate on their road. (*Laws* 1850, *ch.* 71, § 6.)

Gates, how located.—It shall not, any time hereafter, be lawful for any plank road company, formed under the act of May seventh, eighteen hundred and forty-seven, or for any turnpike company, to erect or put up any toll-gate, gate-house or other building within a less distance than ten rods from the front of any dwelling house, barn or other out-house, without the written consent of the owner thereof; and if any toll-gate or other such building shall hereafter be located, by any such company, within said distance, without such consent, the county judge of the county in which such building shall be so located, shall, on application, order the same to be removed. (*Laws* 1851, *ch.* 107, § 2.)

Location, how changed.—The commissioners of highways of any town in which a toll-gate may be located on any such road, or in an adjoining town, whenever they, or a majority of them, shall be of opinion that the location of such gate is unjust to the public interest, by reason of the proximity of diverging roads, or for other reasons, may, on at least fifteen days' written notice to the president or secretary of the said company, apply to the county court of the county in which such gate is located, for an order to alter or change the location of said gate. The court, on such application and on hearing the respective parties, and on viewing the premises, if the said court shall deem such view necessary, shall make such order in the matter as the said court may deem just and proper;

and either party may, within fifteen days thereafter, appeal from such order to the Supreme Court, on giving such security as said county judge shall require. Such order, unless appealed from, shall be observed by the respective parties, and may be enforced by attachment or otherwise, as the said court shall direct. And, if appealed from, the decision of the Supreme Court shall be final in the matter. The said county and Supreme Court may direct payment of costs in the premises as shall be deemed just and equitable. (*Laws* 1847, *ch.* 210, § 37.)

In proceedings to remove a gate under the above provision, the precise point to be established is that the *public interest* is prejudiced. (7 *Hov.* 94.) A gate so placed as to compel persons coming on a converging road to the village to pay half toll for traveling 250 rods upon the plank road, is unjust to the public interest and its location may be changed. (*McAllister v. Albion Plank Road Co.* 10 *Barb.* 610.)

Appeal.—Whenever an appeal to the Supreme Court from an order of the county court, made in the cases provided by section 37 of the act entitled “An act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads,” passed May 7, 1847, shall be brought pursuant to the provisions of said section, the Supreme Court on motion of either party on due notice, shall appoint three disinterested persons who are in no wise interested in such company, or in the question of the location of the toll-gate thereof, and are not residents of any town through or into which such road shall run, or to and from which such road shall be a principal thoroughfare, referees to hear, try and determine the said appeal. (*Laws* 1851, *ch.* 487, § 1.)

Hearing.—Such referees shall proceed to view the premises and the location of the gate affected by the

order appealed from, and shall proceed to a hearing of the respective parties in the same manner as is provided by law, and the rules and practice of the Supreme Court on references of civil actions, and shall report their decisions to the said Supreme Court as referees are required to report, together with the evidence taken by them, and the ground of such decision. And the report of such referees may be reviewed by the said court, and judgment given thereon as justice and equity shall require, in view of the law and the facts so presented, and such judgment shall be final and conclusive. (*Id.* § 2.)

Judgment and costs.—Such referees shall be entitled to the compensation now provided by law for referees in civil actions, to be paid in the first instance by the party in whose favor their report and decision shall be, and the said Supreme Court, on motion, shall award judgment therefor, together with such amount of costs and expenses as shall be deemed reasonable by the said court, to the party succeeding on such appeal, which judgment shall be entered with the order and judgment of said court, affirming or reversing the order of the said county court appealed from, and thereupon the party succeeding may issue execution thereon, and collect and enforce the same as upon judgments in civil actions. (*Id.* § 3.)

The court may order a rehearing before the referees when there has been irregularity in their proceedings, or in the admission of evidence. (7 *How.* 94.)

Where the referees modified the decision of the county court, to change the location of a gate, by changing it to a different place from that designed by the county court, it was held that neither party had succeeded in the appeal, and that the costs were to be awarded as seemed equitable under the circumstances. (*Matter of Lewiston*, 15 *Barb.* 136.)

10. OF TOLLS AND THEIR COLLECTION.

On plank roads.—Upon filing as aforesaid such certificate, the company owning any plank road so inspected, may erect one or more toll gates upon their road, and may demand and receive the following rates of tolls: For every vehicle drawn by one animal, one cent per mile, and one cent per mile for each additional animal; for every vehicle used chiefly for carrying passengers, drawn by two animals, three cents per mile, and one cent per mile for each additional animal; for every horse rode, led or driven, three-quarters of a cent per mile; for every score of sheep or swine, one and a half cents per mile; and for every score of neat cattle, two cents per mile. (*Laws* 1847, ch. 210, § 35, as amended 1853, ch. 245.)

On turnpikes.—Upon filing such certificate as aforesaid, the company owning any turnpike road so inspected, may erect one or more toll-gates upon its road, and may demand and receive toll not exceeding the following rates: For every vehicle drawn by one animal three-quarters of a cent a mile; for every vehicle drawn by two animals, one and one-quarter cents a mile; and for every vehicle drawn by more than two animals, one and one-quarter cents a mile, and one-quarter cents additional a mile for every animal more than two; for every score of neat cattle, one cent a mile; for every score of sheep or swine one-half cent a mile; and in the same proportion for any greater or less numbers of neat cattle, sheep or swine; for every horse and rider, or led horse, one-half cent a mile. And in no case shall any such turnpike company charge or receive rates of toll which will enable it to divide more than twelve per cent on its capital stock actually paid in, in cash and invested in its road, after paying the expenses of managing the same and keeping it in repair. (*Laws* 1847, ch. 210, § 36, as amended 1854, ch. 87)

Who are exempt from tolls on plank roads.—The following persons, and no others, shall be exempt from the payment of tolls at the gates of the several plank road companies, formed under the act entitled "An act to provide for the incorporation of companies to construct plank roads," passed May 7th, 1847:

1. Persons going to or from religious meetings, held at the place where such persons usually attend for religious worship, in the town where they reside, or an adjoining town, or within eight miles of their residence.

2. Persons going to or from any funeral, and all funeral processions.

3. Troops in the actual service of this State or of the United States, and persons going to or from a militia training, which by law they are required to attend.

4. Persons going to any town meeting or general election at which they are entitled to vote, for the purpose of voting or returning therefrom.

5. Persons living within one mile of any gate by the most usually traveled road, shall be permitted to pass the same at one-half the usual rates of toll, when not engaged in the transportation of other persons, or the property of other persons.

6. Farmers living on their farms within one mile of any gate by the most usually traveled road, shall be permitted to pass the same free of toll, when going to or from their work on said farms. (*Laws* 1851, *ch.* 107, § 1.)

The sixth subdivision above cited does not entitle farmers to pass toll-gates free to detached farms or parts of their farms on which they do not reside. The fact that they cultivate such detached land at the same time with the farm on which they reside, does not alter the case. (*Cummings v. Warring*, 39 *Barb.* 630.)

A company may demand and receive toll at a gate for the whole distance between it and the next gate, in the

direction from which the traveler has come, without reference to the fact that he may not have traveled the whole distance upon the road. (*Mallory v. Austin*, 7 Barb. 626; *McAlister v. Albion Plank Road Co.* 11 Barb. 610.)

A toll gatherer has a right to exact payment, in advance, of toll from his gate to the next or for the distance between them, which the traveler admits he is about to travel. (*Kenyon v. Seeley*, 14 Barb. 631.)

Who are exempt from tolls on turnpikes.—The Revised Statutes relating to turnpikes, (1 R. S. 584, § 36,) provides that no toll shall be collected at any gate of any company incorporated under this title in either of the following cases:

1. From any person passing to or from public worship or a funeral; to or from a grist-mill for the grinding of grain for family use; or two or from the blacksmith's shop to which he usually resorts for the work there to be done.

2. From any person going for a physician or midwife, or returning from such errand; going to or returning from court when legally summoned as a juror or witness; going to or returning from a militia training, which by law he is required to attend; or going to a town meeting or election at which he is entitled to vote, for the purpose of giving such vote, and returning therefrom.

3. From any person residing within one mile of the gate at which toll is demanded, unless he shall be employed in the carriage or transportation of the property of other persons not so residing.

4. From troops in the service of this State or of the United States.

Under the above provision one is exempt going to a mill in a town different from that in which he resides. (*Chestney v. Coon*, 8 John. 150.) To exempt a person going to or from a blacksmith's shop to which he usually

resorts, the going thither must be for the purpose of getting work done. Going to pay for work previously done is not sufficient. (*Stratton v. Herrick*, 9 John. 356.) And the purpose of getting the work done must be the principal, and not the incidental object of going. (*Stratton v. Hubbel*, 9 John. 357.)

By the thirty-seventh section of the same statute, it is provided that from carriages having wheels of which the tire or track is:

1. Twelve inches wide, no tolls.
2. Nine inches wide, one-fourth only of the tolls otherwise payable.
3. Six inches wide, one-half only of such tolls shall be collected.

List of tolls to be posted.—It shall be the duty of the president and directors to affix and keep up, at or over each gate (turnpike gate) in some conspicuous place, so as to be conveniently read, a printed list of the rate of toll demandable at such gate. (1 R. S. 585, § 38.)

Commutation.—The president and directors of every turnpike corporation created, or to be created, may from time to time commute with any person whose place of abode shall adjoin or be near to their road for the toll, payable at the nearest gate on each side of such place of abode; but no such commutation shall be for a longer time than one year, and it may be renewed at the end of each period for which it shall be made. (1 R. S. 588, § 52.)

False representations.—Any person falsely representing himself or herself to any toll gatherer, as being entitled to any of the exemptions mentioned in the preceding section of this act, shall forfeit to the company, to be recovered in the corporate name of the company, in any just-

ice's court, the sum of ten dollars. (*Laws* 1849, *ch.* 250, § 3.)

Where a person on passing a gate says, "I am going to mill," and points to the bags, it amounts to a claim of exemption. (*Dexter Plank Road Co. v. Allen*, 16 *Barb.* 15.)

Penalty for not paying toll.—Any person who shall pass any turnpike or plank road gate, without paying the toll required by law, and with intent to avoid the payment thereof, shall for each offence, forfeit and pay to the corporation injured thereby, ten dollars. The penalties in this and the preceding section may be sued for and recovered by any company injured thereby, in any court having jurisdiction thereof. (*Laws* 1855, *ch.* 485, § 3.)

Running gate.—Any person who shall pass any plank road gate, or turnpike gate, without paying the toll, and with the intent to avoid the payment of the same, by which a penalty accrues, or any person committing any depredation or trespass on any plank road or turnpike, may be sued for said penalty or trespass in the county where such offence or trespass was committed, or in the county where such person may reside. (*Laws* 1849, *ch.* 250, § 9.)

Forcibly passing gate.—By the fourth subdivision of section 64 of the Revised Statutes, relating to turnpikes, and which is made applicable to plank roads and turnpikes, under this act. (*Laws* 1849, *ch.* 250, § 5, *as amended* 1850, *ch.* 71, § 2.) It is provided that every person who shall forcibly or fraudulently pass any gate thereon without having paid the legal toll, for each offence shall forfeit to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act.

The penalty named in the statute is intended as a punishment to the wrong-doer and not as a compensation for

damages to the corporation, and it was given to the corporation whose franchise has been violated in order to make its enforcement more certain.

Such corporation does not forfeit its right to recover such penalty, when it has leased a part of its road to be kept in repairs, in consideration of tolls which its lessee is authorized to collect and enjoy; but it may maintain an action for such penalty where the offence was committed at the gate in the possession of its lessee, collecting the tolls for his own benefit. (*Monterey, &c., Plank Road Co. v. Chamberlain*, 32 *N. Y. R.* 659; 33 *N. Y. R.* 46.)

To constitute a forcible passage of a gate, the passage must be effected by actual force, or at least offering some violence. (22 *Barb.* 662; 21 *Barb.* 212, 13 *How.* 448.)

Among the provisions of the Revised Statutes, relating to turnpike roads, made applicable to plank roads and turnpikes under this act, by *Laws* 1847, *ch.* 210, § 117, are the following :

When toll-gatherer may stop travelers.—Each toll-gatherer may detain and prevent from passing through his gate, the persons riding, leading or driving animals or carriages subject to toll, until they shall have paid respectively the tolls authorized by law. (1 *R. S.* 584, § 35.)

This remedy, by closing the gate, is cumulative and does not prevent the company from maintaining an action against one who, under claim of right, passes the gate without payment. (*Jordan &c. Plank Road Co. v. Morley*, 23 *N. Y. R.* 552.)

Toll-gatherer not to hinder travelers.—Every toll-gatherer who, at any turnpike gate, shall unreasonably hinder or delay any traveler or passenger liable to the payment of tolls, or shall demand and receive from any person more toll than, by law, he is authorized to collect, shall, for

each offense, forfeit the sum of five dollars to the person aggrieved. (1 *R. S.* 587, § 50.)

This section does not apply to detention of persons who have a right to pass free. (*Conklin v. Elting*, 2 *John.* 410; see, also, 16 *John.* 73.)

Penalty, how collected.—Whenever a judgment is obtained against a toll-gatherer for a penalty, or for damages, for acts done or omitted to be done by him in his capacity of toll-gatherer, and goods and chattels of the defendant to satisfy such judgment cannot be found, it shall be satisfied by the corporation whose officer he shall be; and if on demand payment be refused by the corporation, the amount thereof may be recovered, with costs, of such corporation. (*Id.* § 51.)

Avoiding toll-gate.—Every person who, to avoid the payment of the legal toll, shall, with his team, carriage or horse, turn out of a turnpike road, or pass any gate thereon, on ground adjacent thereto, and again enter on such road, shall, for each offense, forfeit the sum of five dollars to the corporation injured. (1 *R. S.* 588, § 55.)

The above provision of the Revised Statutes, relating to turnpike roads, is made applicable to plank and turnpike roads under this act. (*Laws* 1847, *ch.* 210, § 48.)

A turning off about half a mile from the gate is held to be on ground adjacent within the above act. (*Carner v. Schoharie Turnpike Co.* 18 *John.* 56.)

The fact that the person, after turning off, traveled on an old public highway makes no difference, for the only question is, whether he turned off the road in good faith or with a view to avoid the toll. (*Id.* *Dansville &c. Plank Road Co. v. Hull*, 27 *Barb.* 509.)

The company have no remedy against one who constructs a road on his own lands, opposite to a toll-gate,

whereby travelers may avoid paying toll. (*Auburn &c. Plank Road Co. v. Douglass*, 9 *N. Y. R.* 444, reversing 12 *Barb.* 553.)

11. PENALTIES FOR INJURING OR OBSTRUCTING.

Penalty for injuring road.—Any person who shall draw or haul, or cause to be hauled or drawn, any logs, timber, or other material, upon the road bed of any plank road or turnpike road, unless the same be entirely elevated above the surface of the road on wheels or runners, by which said road bed shall be injured, or who shall do or cause to be done, any act by which said road bed or any ditch, sluice, culvert or drain appertaining to any turnpike or plank road shall be injured or obstructed, or shall divert or cause to be diverted any stream of water so as to injure or endanger any part of any such turnpike or plank road, shall forfeit and pay the sum of five dollars as a penalty, in addition to the damages resulting from such wrongful act. (*Laws 1855, ch. 485, § 1.*)

Penalty for obstructing.—Any person who shall designedly place or leave, or caused to be placed or left, any log, timber, stone, wood or other materials upon the land held by any turnpike or plank road company, for highway purposes, in such a way as to obstruct the travel upon such road, or to endanger property or persons passing upon such road, shall, in case he or she do not remove such obstruction within forty-eight hours after receiving a written notice from one of the directors of the company owning the road upon which such obstructions have been placed or left, forfeit the sum of ten dollars for every twenty-four hours such obstruction shall remain after such notice. (*Laws 1855, ch. 485, § 2.*)

Fences encroaching.—Whenever the president or secretary of any turnpike or plank road company shall notify

any inspector of roads in the county where such roads are situated, that any person is erecting or has erected any fence or other structure upon any part of the premises set apart by due course of law, for any turnpike or plank road, the said inspector shall proceed to examine the facts, and if it shall appear that such fence or other structures is upon any part of any such road, the said inspector shall order the same to be removed; and any person who shall neglect or refuse to remove the same within twenty days, or such further time, not exceeding three months, as may be fixed by the said inspector, shall forfeit and pay the sum of five dollars for every day during which said fence or other structure shall remain on the said road, to be sued for and recovered by the corporation owning such turnpike or plank road, in any court having jurisdiction thereof; provided, that the said inspector shall not order the removal of any fence previously erected, between the first day of December and first day of April. (*Laws 1855, ch. 485, § 4.*)

Willful injury to road.—The following section of the Revised Statutes, relating to turnpike roads, is made applicable to plank and turnpike roads, under the provisions of this act. (*Laws 1847, ch. 210, § 47.*)

Every person who shall:

1. Willfully break, cut down, deface or injure any milestone or post on any turnpike road; or,
2. Willfully break or throw down any gate or turnpike on such road; or,
3. Dig up or spoil any part of such road, or anything thereunto belonging; or,
4. Forcibly or fraudulently pass any gate thereon without having paid the legal toll,

For each offence, shall forfeit to the corporation injured, the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act. (1 *R. S.* 588, § 54.)

A turnpike corporation may lawfully remove fences or other encroachments upon their road, and are not compelled to resort to a remedy by action. (*Estes v. Kelsey*, 8 *Wend.* 555.) The proper course, however, is to notify the inspector, as provided above. The company are entitled to damages for any interference that obstructs or impairs the use of its road, as far as the laying of a railroad track across it, though such railroad is authorized by law. (*Seneca Road Co. v. Auburn &c. R. R. Co.* 5 *Hill*, 170; *Mahon v. Utica &c. R. R. Co.* *Lalor*, 156.)

12. OF TAXES ON ROADS.

Taxes on roads.—So much of any such road and of the toll-houses, gates and other appurtenances thereof, constructed by virtue of this act, as shall be within any town, city or village, shall be liable to taxation in such town, city or village, as real estate. (*Laws 1847, ch. 210, § 48.*

When exempt from taxation.—Toll-houses and other fixtures, and all property belonging to any plank or turnpike road company, shall be exempt from assessment and taxation for any purpose whatsoever, until the surplus annual receipts of tolls on their respective roads, over necessary repairs and a suitable reserve fund for repairs and relaying of plank, shall exceed seven per cent. per annum on the first cost of such road. In case of any disagreement between the assessors of any town, village or city, and any such company, concerning such exemption claimed, said company may appeal to the county judge of the county in which such assessment is proposed to be made, who shall, after due notice to the appealing party of such appeal examine the books and vouchers of such company, and take such further proof as he shall deem proper, and shall decide whether such company is liable

to taxation under this section, and his decision shall be final. (*Laws* 1854, *ch.* 87, § 4, *as amended* 1855, *ch.* 546 § 5.)

13. OF BRANCH ROADS AND EXTENSIONS.

When road extended or changed.—The directors of any plank road company formed under the act passed May 7th, 1847, entitled, "An act to provide for the incorporation of companies to construct plank roads, and for companies to construct turnpike roads," may, with the written consent of the persons owning two-thirds of the stock, and with the written consent of a majority of the inspectors, whose appointment is provided for in the 23d section of said act, construct branches to their main line of road, or extend their main line, or change the route of their road, or any part thereof, which branches or extensions shall in all respects be governed by the same rules, and affected by the same laws, as the main line of road, and the said directors may increase the capital stock of the company to an amount not exceeding two thousand dollars a mile of such branches or extensions for their construction, and distribute the certificates therefor among the stockholders of the company, in proportion to the stock owned by them severally, if such stockholders shall demand and pay up the same; and in case the new stock, after the directors have given public notice in some newspapers printed in every county in which their road is situated, for six successive weeks, is not demanded and paid by the stockholders, they may permit any person or persons to subscribe and pay on the new stock the same percentage that had been paid on the original stock of the company, and the same shall in all respects be held and considered as though it had formed a part of the original stock of the company. The right of way for any such branches or extensions shall be acquired by the company

in the same manner as is now provided by law for plank road companies to acquire the right of way for their roads. (*Laws 1849, ch. 250, § 1.*)

The acts of the directors, after the formation of the company, in extending the main line of the road beyond the point originally specified, and increasing its capital stock, without the written consent of the persons owning two-thirds of the stock, or of a majority of the inspectors, &c., as provided by section 1 of the plank road act, are unauthorized and illegal, and exonerate the original stockholders from all liability to pay their subscriptions. Nor will the fact that the stockholder participates in proceedings of the company contemplating the extension, "if it can legally be done," and retains his stock after the extension has been made, and sells it for value, estop him from denying his liability to pay his subscription. (*Macedon, &c., Plank Road Co. v. Lapham, 18 Barb. 312.*)

Constructing branches.—The directors of any plank road company, or turnpike road company, formed under the act passed May seventh, eighteen hundred and forty-seven, entitled, "An act to provide for the incorporation of companies to construct plank roads, and for companies to construct turnpike roads" may, with the written consent of the persons owning two-thirds of the stock, construct branches to their main line of road, or extend or change the route of their road, or any part thereof, whereby the public interest will be promoted, through any uncultivated or unimproved lands. (*Laws 1859, ch. 209, § 1.*)

May take and hold real estate.—The directors of any such company may purchase, take and hold any real estate necessary for the aforesaid purposes, and by their agents, servants or other persons employed, may enter upon the lands of any person or persons which may be necessary

for said purpose, and may construct their road upon any lands so entered upon, purchased or held. (*Id.* § 2.)

Lands to be surveyed.—Before entering, taking or using any land for the purpose of this act, the directors of any such company shall cause a survey and map to be made of the lands intended to be taken or entered upon, for any of said purposes, and by which the land of each owner and occupant intended to be taken and used shall be designated, and which map shall be signed by the surveyor or engineer making the same, and by the president of such company and acknowledged by them, and be filed in the office of the clerk of the county. The directors of any such company, by any of its officers, agents, or servants, may enter upon any lands for the purpose of making any examination, and of making survey and map, doing no unnecessary damage. (*Id.* § 3.)

Lands, how taken.—In case the directors of any such company cannot agree with the said owners and occupants of said land intended to be taken and used for the purposes of this act, the directors may apply to the judge of the county court for the appointment of three disinterested persons, not the owners of real estate in any town through which any land intended to be used for the purposes of this act, or in any town adjoining such town, as commissioners, by whom the compensation to be paid for the damages suffered or to be suffered by any person or persons, by reason of taking any of said lands for the purposes of this act, shall be ascertained and determined; and in case of the death, resignation, refusal or disability to act of any of said commissioners, the said judge may appoint others in their places.

Commissioners to give notice.—The commissioners shall give at least ten days' written notice of the time and

place to hear the parties interested, to be served personally on the parties interested, or, in their absence from their dwellings or places of business, by leaving the same thereat, with some person of suitable age; and in case of any legal disability of such owner or owners to act thereupon, serving notice in like manner upon his or her guardian, or person appointed to act for him or her, as hereinafter directed; and in case any of said owners shall be married woman, insane, infants or idiots, the said judge shall appoint some suitable person to attend in their behalf, before the said commissioners, and take care of their interest in the premises. The commissioners may issue subpoenas to compel the attendance of witnesses to testify before them, and they or any of them, may administer the usual oath to such witnesses. They shall determine the width of road through said lands, and make a report of all proceedings before them, containing the testimony taken by them, and make an actual survey and description thereof, as laid out by them, and the sum awarded to each owner, or any other person, duly signed or acknowledged by them, and return the same to said judge to be filed on record. (*Id.* § 4.)

Fees of Commissioners.—Each commissioner is entitled to receive two dollars per day for his fees, to be paid by the company. (*Id.* § 5.)

Appeal, how taken.—The directors of any plank or turnpike road company, or any party to the proceedings of the commissioners, may appeal from any award or determination of the commissioners to the said county judge, providing the party appealing shall, within ten days after such award or determination shall be made, give written notice of the appeal to the other party or parties interested in the same; and the said judge shall

examine the report of the commissioners, and if their proceedings in the case have been irregular, the said judge may set the same aside and order new proceedings and appointments; and the said judge may make such orders in reference to the proceedings of the commissioners and of notice to be given by the parties as may not be inconsistent with this act, and as the nature of the case and the interest of the parties may require. And the said commissioners shall again examine the case, and the decision then made shall be final (*Id.* § 6.)

When may enter upon lands.—Upon the payment or legal tender of the compensation determined as before provided, the said directors of any plank road company, or any turnpike road company, shall be entitled to enter upon, for the purposes contemplated by this act, all the lands and real estate for which such compensation shall be paid or tendered, as aforesaid, and to hold and use the same for the said purposes, to them and their successors forever. If any person to whom any compensation shall be awarded, or who shall be entitled to the same by virtue of said award, cannot be found, or shall refuse to receive the sum awarded to him or her, then the said payment may be made by depositing the amount of the said award to the credit of said person, in such bank as may be appointed by said judge. If the person to whom compensation is awarded, or who is entitled to receive the same as aforesaid, be under legal disability as aforesaid, payment may be made to his guardian or person appointed as aforesaid, by said judge, and if said guardian or person appointed cannot be found, then by deposit in bank, as aforesaid. (*Id.* § 7.)

Directors to take and hold real estate.—The directors of any plank road company or turnpike road company shall

take and hold for the purpose contemplated in this act, all the lands and real estate which they shall in any way legally enter upon and take by virtue hereof, to them and their successors so long as the same shall be used for a road. (*Id.* § 8.)

14. POWERS OF PURCHASERS ON SALE UNDER MORTGAGE OR EXECUTION.

Purchasers on foreclosure to operate.—Whenever any plank road or turnpike road shall be sold, upon the foreclosure of any mortgage, given by such company upon its road and franchise thereof, to secure the payment of any bond or bonds of such company, it shall be lawful for such purchaser or purchasers thereof, at such sale, and they are hereby authorized to maintain and operate such road, in the same manner, with the same privileges, and subject to the same restrictions, in all respects, as the company owning such road could do at the time such sale was made. (*Laws* 1866, *ch.* 780, § 1; see also *Laws* 1859, *ch.* 209, § 9.)

When purchasers may form corporation.—Such purchaser or purchasers, on associating with him or them, not less than four persons, may be formed into a corporation for the purpose of owning and operating such plank road or turnpike road, upon complying with the requirements of section second of an act entitled, "An act in relation to the sale of plank roads and turnpike roads on execution, and to provide for the incorporation of purchasers at such sales, into companies, to own and operate such roads," passed April fifteenth, eighteen hundred and fifty-seven. (*Id.* § 2.)

This act shall apply, as well to any such sale heretofore, as hereafter made, saving, however, to the stockholders of

such company or any of them, such rights as they, or either of them, had at the time of the passage of this act, under any such sale heretofore made. (*Id.* § 3.)

When purchasers on execution may operate.—Whenever any plank road or turnpike road shall be sold upon any execution, and shall not be redeemed from such sale according to law, then it shall and may be lawful for the purchaser or purchasers of such road, and they are hereby authorized to maintain and operate the same, in the same manner and subject to the same privileges and restrictions in all respects, as the company owning such road at the time such sale was made. (*Laws 1857, ch. 482, § 1.*)

Purchasers may form association.—Such purchaser or purchasers, on associating with him or them not less than four persons, may be formed into a corporation for the purpose of owning such plank road or turnpike road, by complying with the following requirements:

Articles of association.—They shall severally subscribe articles of association, in which shall be set forth the name of the company, the number of years the same is to continue, which shall not exceed the unexpired term of the original incorporation of the company whose road was so sold, whether it is a plank road or a turnpike road which the company is formed to own and operate; the amount of the capital stock of the company, which shall not exceed the amount of the capital stock of the company owning such road at the time of such sale; the number of shares of which the said stock shall consist; the number of directors and their names, who shall manage the concerns of the company for the first year, and shall hold their offices until others are elected; the place from and to which said road is constructed, and each town, city and village into or through

which said road shall pass, and its length, as near as may be. Each subscriber to such articles of association shall subscribe thereto his name and place of residence, and the number of shares of stock owned by him in said company. The said articles of association may then be filed in the office of the Secretary of State, and thereupon the persons who have so subscribed, and all persons who shall, from time to time, become stockholders in such company, shall be a body corporate by the name specified in such articles, and shall possess the same powers and privileges, and be subject to the same provisions as companies organized under the act entitled, "An act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads," passed May seventh, one thousand eight hundred and forty-seven. (*Id.* § 2.)

15. ACTIONS AGAINST A CORPORATION AND STOCKHOLDERS.

Action against.—In any action against any company formed under the provisions of this act, the plaintiff may include as defendants any one or more of the stockholders of such company, who shall by virtue of the provisions of this act, be claimed to be liable to contribute to the payment of the plaintiff's claim; and if judgment be given against such company, in favor of the plaintiff for his claim or any part thereof, and any one or more of the stockholders so made defendants shall be found to be liable as aforesaid, judgment shall also be given against him or them, and shall show the extent of his or their liabilities individually. The execution upon such judgment shall direct the collection of the sum for which it may be issued, of the property of such company liable to be levied upon by virtue thereof; and in case such property, sufficient to satisfy the same, cannot be found in the county of the officer to whom the same shall be directed,

that the deficiency, or so much thereof as the stockholders, who shall be defendants in such judgment, shall be liable to pay, shall be collected of the property of such stockholders respectively. And, if in any such action, any one or more of such stockholders shall be found not to be liable for the demand of the plaintiff or any part thereof, judgment shall be given for the stockholders so found not to be liable, but no verdict or judgment in favor of any such stockholder shall prevent the plaintiff, in such action, from proceeding therein against the company alone, or against it and such defendants who are stockholders as shall be liable for such demand or some portion thereof. Suits may be brought against one or more stockholders who are claimed to be liable for any debt owing by the company, or any part of such debt, without joining the company in such suit; but no such suit shall be so brought until judgment on the demand shall have been obtained against the company, and execution thereon returned unsatisfied in whole or in part, or the company shall have been dissolved; but it shall not be necessary that such dissolution shall have been declared by any judicial decree, sentence or determination; and in such suit there may be a verdict and judgment in favor of any defendant not liable as aforesaid; but such verdict and judgment shall not prevent the plaintiff in such suit from proceeding therein against any defendant who shall be liable as aforesaid. (*Laws 1847, ch. 210, § 46.*)

Proof of incorporation.—In any action hereafter brought by or against any plank or turnpike road company, organized under the laws of this State, which shall have been in actual operation, and being in the possession of a road upon which they have taken toll for five consecutive years next preceding the commencement of such action, parol proof of such corporate existence and use shall be suffi-

cient for all purposes of the action, unless the opposing party shall set up a claim in his complaint or answer, duly verified, of title in himself to the road, or some part thereof, stating the nature of his title and right to the immediate possession and use thereof. (*Laws 1855, ch. 546.*)

Within what time action for penalties to be commenced.—No action to recover any penalty against any company formed under an act entitled "An act for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads, and the acts amending the same, or against any turnpike corporation, shall be commenced or maintained against such company, or any of its officers or agents, unless the same is commenced within thirty days after the penalty was incurred." (*Laws 1850, ch. 71, § 3.*)

Actions against stockholders.—Whenever any judgment shall have been recovered by any person in any court of record in this State, against any corporation organized or incorporated under and by virtue of the act entitled "An act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads," passed May seventh, one thousand eight hundred and forty-seven, on a demand arising upon a contract, and for the payment of which the stockholders of such company are liable in their individual capacity as mentioned and declared in the said act, and an execution on such judgment shall have been duly issued to the proper county against the property of such corporation, and been returned unsatisfied in whole or in part, then any such creditor or creditors, his or their personal representatives, may commence an action in the mode now provided by law, in the supreme court in the county in which the office of such corpora-

tion is held, or in which the stockholders reside, on behalf of himself or themselves, and of all other creditors of such corporation who shall come in and seek relief by and contribute to the expense thereof, against all the stockholders and any former stockholders, for the purpose of enforcing against such stockholders their respective individual liabilities under said law to pay the debts of such corporation, whether due at the commencement of such action or to become due thereafter if contracted or incurred previously; and any other person or party who may have an interest in the event or determination of such action may be made parties defendants at the commencement or in any subsequent stage of the action. (*Laws 1855, ch. 390, § 1.*)

Judgment, how enforced.—The court in which such action may be pending shall proceed therein as in similar cases, and shall have jurisdiction and authority to enforce the payment of all arrears due from and owing by any stockholder on the stock subscribed for and owned by him, and shall also ascertain all the debts of such corporation which the stockholders thereof are individually liable to pay, and shall assess and apportion the total amount of such indebtedness for which the stockholders are by law liable to pay, including the reasonable costs and disbursements of the plaintiff in such action on and among the respective stockholders or persons liable to pay the same, according to their individual liability, and shall enforce the payment thereof by each stockholder by its judgment and by execution or executions, in the name of the plaintiffs in such action, or in the name of the receiver in the action, if one shall have been appointed against the respective stockholders, as in other cases. (*Laws 1855, ch. 390, § 2.*)

Stockholders, when creditors.—Every stockholder of such corporation who at any time before the commencement of such action shall have due or owing to him any demand or claim arising on contract against such corporation, or who may have paid any debt or demand against such corporation either voluntarily or by compulsion, and for which the stockholders of any such corporation are or would be personally liable under the provisions of the said act of May seven, one thousand eight hundred and forty-seven, shall be deemed a creditor, and shall be entitled to appear in said action and to prove his claim and demand, and to have judgment therefor, or a credit for the amount upon his individual liability as a stockholder, to pay the debt of such corporation, to be ascertained and adjudged in said action; and shall receive payment thereof in the mode or manner that may be directed or ordered by the court in the judgment in such action. (*Id.* § 3.)

Limitation of actions.—Whenever any such action shall have been commenced against the stockholders of any corporation, as provided in the first section of this act, the court shall possess all the powers and authority in relation to such action and the proceedings therein and the parties thereto, as was exercised by the late court of chancery in this State in proceedings against corporations in equity, under and by virtue of article second of title four, chapter eight, part third of the Revised Statutes, so far as the same may be consistent with this act, and any creditor of such corporation who shall not, on being duly required by the court, and in such manner as the court shall direct, exhibit his claim and become party to such suit within a reasonable time, not less than six months from the first publication of such notice by order of the court, shall be precluded from all benefit of the judg-

ment which shall be rendered in such suit, and from any distribution of moneys which may be made under such judgment among the creditors of the said corporation (*Id.* § 4.)

Distribution of money recovered.—The court shall cause the moneys so assessed upon and collected from the stockholders of such corporation for the purposes contemplated by this act, by virtue of the judgment in such action, after paying the costs and disbursements of such action, to be applied to the payment and extinguishment of the debts against such corporation, which shall be established and proved in said action to be debts which by law the stockholders of such company are liable individually to pay without preference, except where such preference exists by law; and in case any debt so established shall not be due, and the person to whom it belongs or is payable declines to receive the same, in such case the court may make such order as to the deposit or investment of such moneys so due to any such creditor, or for his use or benefit, and for the payment thereof when due, as shall be just and equitable. (*Id.* § 5.)

16. HOW DISCONTINUED.

Road may be surrendered.—The directors of any plank road company or turnpike company, formed under the act passed May 7, 1847, entitled "An act to provide for the incorporation of companies to construct plank roads, and for companies to construct turnpike roads," and every plank road company or turnpike company incorporated under or by any law of this State, are hereby authorized to abandon the whole or any part of their plank road or turnpike road, at either or both ends thereof, whenever the stockholders holding two-thirds of the stock in said road company shall consent to the same, by a written declara-

tion of the surrender of such part or parts of said road, which said declaration shall be attested by their common seal, and acknowledged by the president and secretary of said company before an officer empowered to take the acknowledgments of deeds. Such declaration and consent shall be filed and recorded in the clerk's office of the county in which the part or parts of said road abandoned shall be situated, and thereupon the plank or turnpike road, or the portion thereof so surrendered, shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed, and the said company shall be no longer bound to maintain it or be liable to be assessed thereon, or be permitted to collect tolls for traveling over the same, from the time of recording said declaration of surrender and consent, without impairing the right of said company to take toll on the remaining part of their plank road or turnpike road at the rate prescribed in its charter, or by the laws of this State relating to any such company. (*Laws 1854, ch. 87, § 1.*)

Whenever any turnpike corporation shall become dissolved or the road discontinued, its road shall become a public highway and be subject to all legal provisions regarding highways. (*Laws 1838, ch. 262, § 1.*)

Turnpike and plank roads are, as a general rule, like ordinary highways, simply easements; the fee remaining in the owner of the soil, and upon their abandonment, reverting without further incumbrance. Where the language of an act, incorporating a turnpike or plank road company, is such as to vest the title to the land over which the road passes, in the company, it must, nevertheless, be considered as vested only for the purpose of the road; and when the road is abandoned the land reverts to the original owners. (*Dunham v. Williams, 36 Barb. 136; Hooker v. Utica, &c., Turnpike Co. 12 Wend. 371; People*

v. *White*, 11 *Barb.* 26; see *Rogers v. Bradshaw*, 20 *John.* 741; *Estes v. Kelsey*, 8 *Wend.* 559, and *ante p.* 30.)

When a turnpike company becomes dissolved, or its road discontinued, it is the duty of the commissioner to form it into a road district and to cause it to be worked and kept in repair in the same manner as other public highways, and in case of their neglect or refusal so to do, a mandamus may be had to compel them to perform their duty.

Corporation to cease.—Every company incorporated under this act shall cease to be a body corporate:

1. If within two years from the filing of their articles of association, they shall not have commenced the construction of their road, and actually expended thereon at least ten per cent of the capital stock of such company, and,

2. If within five years from such filing of the articles of association, such road shall not be completed according to the provisions of this act. (*Laws* 1847, *ch.* 210 § 49.)

What shall not work forfeiture.—Every company formed or organized under the above act of 1847, and the several acts amending the same, shall be deemed to be a valid corporation, although such company may not have complied with the requirements of such acts in the formation and organization of such company, and preparatory to the construction of its road, and no act or omission on the part of any such company, or of its stockholders or officers, shall work a forfeiture of its corporate powers or franchises, unless the same was willful and malicious; but this section shall not affect or impair any right of action heretofore accrued. (*Laws* 1854, *ch.* 87, § 6; see similar provision, *Laws* 1850, *ch.* 71.)

Failure to complete road.—No plank road company shall be deemed to have forfeited any privilege or franchise by

reason of not having completed their road the whole distance mentioned or described in their articles of association. (*Laws* 1855, *ch.* 546, § 2.)

No plank road or turnpike road company, corporation or association heretofore formed or organized under the act entitled "An act for the incorporation of companies to construct plank roads, and companies to construct turnpike roads," passed May seventh, eighteen hundred and forty-seven, and the several acts amending the same shall be deemed invalid, or to have forfeited any of its powers, rights or franchises, by reason of any failure on the part of such company, or the persons organizing the same, to have complied with the requirements of such acts in the formation or organization of such company, as to the number of stockholders or persons who signed the articles of association of such company or association, or in the publication of notices in the organization thereof, or by reason of any informality or defect in the signing of such articles of association, or in the publication of the notices aforesaid; and the stockholders, officers and creditors of every such company, are hereby declared to have the same rights, and the stockholders to be subject to the same obligations and liabilities as if such company had strictly complied with all the requirements of the law aforesaid, to create and perfect a complete body corporate; provided that this act shall only apply to such companies as shall have attempted an organization, and shall have actually constructed a road wholly or in part, according to their articles of association. (*Laws* 1862, *ch.* 248, § 1.)

APPENDIX OF FORMS.

No. 1.

OATH OF COMMISSIONER.

See *ante* p. 61.

RENSSELAER COUNTY, *ss* :

I, E. D., of the town of Pittstown, in said county, having been elected commissioner of highways of said town, do solemnly swear (or affirm), that I will support the Constitution of the United States and the Constitution of the State of New York, and that I will faithfully discharge the duties of commissioner as aforesaid, according to the best of my ability.

E. D.

Sworn, &c.

No. 2.

CERTIFICATE OF JUSTICE.

See *ante* p. 61.

COUNTY OF RENSSELAER, }
Town of Pittstown, } *ss* :

I, Theodore C. Richmond, justice of the peace in and for the town of Pittstown, in said county (or town clerk

of the town of Pittstown, in said county), do hereby certify, that on the 12th day of November, 1867, personally appeared before me M. M. of said town, who then and there duly took and subscribed the foregoing oath.

THEODORE C. RICHMOND,

Dated, &c.

Justice of the Peace.

No. 2.

BOND OF COMMISSIONERS.

See *ante p.* 64.

Know all men by these presents, that we, A. B., C. D., and E. F., of the town of Grafton, county of Rensselaer, and State of New York, are held and firmly bound unto G. H., supervisor of said town, in the penal sum of one thousand dollars, to be paid to the said supervisor, or to his successor in office. For which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 12th day of November, 1867.

Whereas, the above named bounden A. B. was, on the 5th day of November, 1867, duly elected commissioner of highways of the town of Grafton, in the county of Rensselaer ;

Now, therefore, the condition of this bond is such, that if the said A. B. shall faithfully discharge his duties as such commissioner, and shall, within ten days after the expiration of his term of office, pay over to his successor, all moneys remaining in his hands as such commissioner, and render to such successor a true account of all moneys received and paid out by him as such commissioner, with-

out fraud or delay, then this obligation to be void, otherwise to be of full force and virtue.

Signatures and Seals.

Witness, _____

Add justification and acknowledgment as in Nos. 4 and 5.

No. 4.

AFFIDAVIT OF JUSTIFICATION.

COUNTY OF RENSSELAER, ss :

C. D. and E. F., the sureties named in the foregoing bond, being severally duly sworn, doth each for himself say, that he is a resident and freeholder (or householder) within this State, and worth one thousand dollars over and above all his debts and liabilities, and exclusive of property exempt from execution.

C. D.

E. F.

Sworn, &c.

No. 5.

ACKNOWLEDGMENT.

COUNTY OF RENSSELAER, ss :

On this twelfth day of November, 1867, personally appeared before me C. D. and E. F., to me known to be the persons described in, and who executed the foregoing obligation, and severally acknowledged that they executed the same.

R. A.,

Justice of Peace.

No. 6.

INDORSEMENT OF SUPERVISOR'S APPROVAL.

See *ante*, p. 64.

I approve of the within bond, and of the sufficiency of
the sureties therein named. G. H.,

Supervisor of the town of Grafton.

Dated, &c.

No. 7.

NOTICE OF COMMISSIONERS RESIGNATION.

See *ante* p. 65.

To A. B., C. D., and E. F., Esqrs.,

Justices of the Peace of the Town of Pittstown:

Take notice that I hereby tender my resignation of the
office of commissioner of highways of the said town of
Pittstown, for the following reasons: (Give reasons.)

Dated, etc.

G. H.

No. 8.

ORDER APPOINTING COMMISSIONER TO FILL VACANCY.

See *ante* p. 62.

COUNTY OF RENSSELAER, }
Town of Pittstown, } ss:

Whereas a vacancy has occurred in the office of com-
missioner of highways of the town of Pittstown, by reason
of the death (*or, as the case may be*), of George Holmes,
heretofore elected to said office from said town.

Now, therefore, by virtue of the power vested in us by
the statute, in such case made and provided, we the under-

signed, three of the justices of the peace of said town, do hereby, in order to fill such vacancy, nominate and appoint Charles Adams, commissioner of highways of said town, to hold his said office until the next succeeding annual town meeting of said town, as by law provided.

In witness whereof we have hereto set our hands this tenth day of July, 1867.

Signatures.

No. 2.

ORDER ASCERTAINING AND DESCRIBING ROAD.

See *ante* p. 69.

Whereas, a road, used as a highway, in the town of Pittstown, county of Rensselaer, leading from A to B, was laid out by the commissioners of highways of said town, on the first day of April, 1840, but not sufficiently described (or has been used as a public highway for twenty years last-past but not recorded.)

Now, therefore, we the undersigned commissioners of highways of said town, having met at the house of Royal Abbott, in said town, for the purpose of causing said road to be ascertained, described and entered of record in the town clerk's office,—all the said commissioners being present, and having deliberated (*or all the said commissioners having been duly notified to attend this meeting for the purpose of deliberating*) on the subject embraced in this order, do hereby order that the said road be ascertained, described and entered of record. And the said commissioners having caused a survey of the said road to be made, do further order that said road is hereby ascertained and described according to the said survey, being as follows: beginning at (*insert survey.*) And it is further

ordered that the line above described be the *center* line of the said road, and that the said road be of the width of *three* rods.

In witness whereof, the said commissioners have hereunto subscribed their names the first day of April, 1867.

Signatures.

No. 10.

ORDER DIVIDING TOWN INTO ROAD DISTRICTS.

See *ante* p. 79.

The undersigned commissioners of highways of the town of Pittstown, in the county of Rensselaer, having met and deliberated on the subject embraced in this order; all said commissioners being present, and having deliberated thereon (*or all said commissioners having been duly notified to attend here for the purpose of deliberating thereon*), do hereby order that the said town be and the same is hereby divided into *ten* road districts, as follows, to wit: Road district number one, shall include all that part of said town, lying between, etc., ; and all the inhabitants residing in said district, and liable to work on highways, shall be and are hereby assigned to work in said district number one. (*If any out of said district be assigned to work therein, insert.*) And the following inhabitants, residing out of said district, are hereby assigned and required to work therein, to wit: J. C., etc., District number two, etc., (*proceed in like manner till all are described.*)

In witness whereof, we have hereto subscribed our names this tenth day of July, 1865.

Signatures.

No. 11.

COMMISSIONERS' ANNUAL ACCOUNT.

See *ante* p. 86.

The undersigned, commissioners of highways of the town of Auburn, in the county of Cayuga, hereby render to the board of auditors of said town, their annual account for the year ending February 1st, 1866:

1. The highway labor assessed in said town for the year ending on the said first day of February, was *seven hundred and ten* days, and the highway labor performed in said town during the said year, was *five hundred and eighty-nine* days, as appears by the accounts rendered us by the several overseers of highways in said town.

2. The said commissioners have received, during the said year, the following sums of money for fines and commutations under the statute relative to highways, to wit:

Date.	From whom received.	On what account.	Amount.
-------	---------------------	------------------	---------

They have also received from other sources under said statute, etc.

3. The improvements which have been made on the roads and bridges in said town, during said year, are as follows: (*Specify improvements.*) And the roads and bridges in said town are (*give state of them, and specify whether they are in good repair or otherwise.*)

4. The following improvements are necessary to be made on the roads and bridges in said town, to wit: (*Specify necessary improvements.*)

5. The probable expense of making such improvements, beyond what the labor to be assessed this year will accomplish, is by us estimated at \$250.

Given under our hands, this tenth day of February, 1866.

Signatures—Commissioners.

No. 12.

STATEMENT AND ESTIMATE FOR SUPERVISOR.

See *ante* p. 88.

To the supervisor of the town of Watervliet, in the county of Albany:

The commissioners of highways of said town do hereby report that the following improvements are necessary to be made on their roads and bridges in their said town, to wit: (*Specify improvements.*) That the probable expense of making such improvements is by us estimated at \$250.

Given under our hands, &c.

No. 13.

NOTICE OF APPLICATION FOR ADDITIONAL APPROPRIATION.

See *ante* p. 89.

Notice is hereby given to the electors of the town of Pittstown, in the county of Rensselaer, that the commissioners of highways of said town are of opinion that the sum of two hundred and fifty dollars, as now allowed by law, will be insufficient to pay the expenses actually necessary for the improvement of roads and bridges in said town, and that the additional sum of two hundred and fifty dollars is necessary to make a bridge across the — creek, near —, (or to repair the bridge, etc., or to improve the road at, &c.) And that we the undersigned, commissioners of highways of said town, shall, at the next annual town meeting of said town, to be held at Tomhannock on the tenth day of March next, apply in open town meeting for a vote authorizing the said sum of two

hundred and fifty dollars, to be raised for the purpose
aforesaid. Signed.

Dated, etc.

No. 14.

ORDER APPOINTING OVERSEERS.

See *ante* p. 92.

COUNTY OF RENSSELAER, *ss* :

We the undersigned, commissioners of highways of the town of Pittstown, in the county of Rensselaer, having met and deliberated on the subject of this order, (*where only two sign*, add all the commissioners in said town having met and deliberated thereon, or all the commissioners, etc., having been duly notified to attend said meeting of the commissioners, for the purpose of deliberating thereon,) do, by virtue of the power vested in us by the statute, hereby appoint the following named persons overseers of highways of and for the several road districts in said town, set opposite their respective names, to wit: District No. 1, Martin Bancus; district No. 2, Nathan G. Akin. Each of said overseers to hold his said office for and during the term of one year from the 3d day of March, 1867.

In witness whereof we have hereto placed our hands
this 3d day of March, 1867. Signed.

No. 15.

APPOINTMENT OF OVERSEER IN CASE OF VACANCY.

See *ante* p. 93.

TOWN OF PITTSTOWN, }
County of Rensselaer, } *ss* :

Whereas, a vacancy has occurred in the office of overseer of highways for road district number *eight*, in said

town, by reason of the refusal to serve (*or as the case may be*) of A. B. Now, therefore, by virtue of the power vested in us by the statute in such case made and provided, we, the undersigned, commissioners of highways of said town, having met and deliberated on the subject embraced in this warrant, (*where only two sign, add all the commissioners of highways of said town having met and deliberated, or all the commissioners, etc., having been duly notified to attend this meeting of the commissioners for the purpose of deliberating thereon,*) do hereby, in order to fill said vacancy, appoint Asa Shedd, overseer of highways, of and for said road district number *eight*, in said town.

In witness whereof, we have hereto placed our hands this tenth day of July, 1867.

Signed.

No. 16.

COMPLAINT TO COMMISSIONER AGAINST OVERSEER.

See *ante* p. 94.

To the commissioners of highways of the town of Pittstown :

The complaint of A. B., a resident of the town of Pittstown, respectfully sheweth that C. D., the overseer of highways for road district number five, in said town, *has neglected and refused to warn E. F. to work on the highways, in said district, after having been required so to do by the commissioners, or one of them.* And the said A. B. hereby requires the said commissioners of highways to prosecute the said C. D., for said offence.

Dated, &c.

A. B.

No 17.

SECURITY TO COMMISSIONERS FOR PROSECUTING OVERSEER.

See *ante p.* 94.

Whereas, John Doe has made complaint to the commissioners of highways of the town of Brunswick, that Henry Baker, overseer of highways for road district number *three*, in said town, has neglected and refused to (*insert matter complained of.*)

Now therefore, we, J. D. and W. H., of said town, do hereby undertake, pursuant to the statute in such case made and provided, that we will well and truly indemnify and save harmless, the said commissioners of highways, against any costs which may be incurred in prosecuting for the penalty annexed to such refusal or neglect.

(Signed.)

Dated, &c.

No. 18.

CONSENT FOR RAILROAD TO CROSS HIGHWAY.

See *ante p.* 101.

COUNTY OF RENSSELAER, }
Town of Pittstown, } ss :

We, the undersigned commissioners of highways of said town, do hereby consent that the Troy and Boston Railroad Company may construct a railroad across the public highway leading from (*describe highway*), provided that the usefulness of said highway be not impaired.

Given under our hands this tenth day of June, 1850.

Signed.

No. 19.

AGREEMENT TO USE HIGHWAY FOR PLANK ROAD, ETC.

See *ante* p. 103.

This agreement made this *third* day of November, 1867, between A. B., supervisor of the town of Pittstown, county of Rensselaer, and C. D. and E. F., commissioners of highways of said town, of the first part, and the Northern Turnpike Company of the second part.

Witnesseth, That the said party of the first part, having first become satisfied that at least two-thirds of all the owners of land along the highway (*describe it*), and who actually reside thereon, have consented in writing to the construction of a turnpike by said party of the second part, on such highway, do for values received, hereby grant and convey to the said party of the second part, the right to use and occupy the public highway above described, for the purpose of a turnpike road, so long as the same shall be needed by said party of the second part.

In witness whereof, &c.

Signed.

No. 20.

COMPLAINT TO COMPEL DELIVERY OF BOOKS, ETC., TO
SUCCESSOR.

See *ante* p. 108.

STATE OF NEW YORK, }
County of Rensselaer, } ss:

To the Hon. C. R. INGALLS,

Justice of the Supreme Court:

A. B. of said county, being duly sworn, makes complaint against C. D., late commissioner of highway of the

town of Pittstown in said county, and says: that the deponent was duly elected commissioner of highways of said town of Pittstown, at an annual town meeting of such town, held on the sixth day of March, 1867; that he has taken and filed the oath prescribed by law, and has given the requisite bond.

That by virtue of such election he is successor to the said C. D., late commissioner as aforesaid. That he has required and demanded that the said C. D. deliver over to him, as such successor, all the records, books and papers in his possession or under his control, belonging or appertaining to the said office of commissioner of highways.

And this deponent further alleges that the said C. D. has refused and neglected so to deliver such records, books and papers, or any part thereof, and that as this deponent is informed and believes, said C. D. has in his possession or under his control, the following records, books and papers appertaining to the said office of commissioner of highways (*insert description if known, if not say so*), and that he unjustly and unlawfully withholds the same from this deponent.

A. B.

Sworn to, &c.

No. 21.

ORDER THEREUPON GRANTED.

See *ante* p. 109.

STATE OF NEW YORK, }
County of Rensselaer, } ss:

Complaint having been made to me the undersigned as follows, to wit: (*insert a copy of the complaint*), and being satisfied by the oath of the said complainant (*add "and other testimony offered" if any such was offered*), that the said books and papers (*or either, according to the fact,*)

are withheld as aforesaid, I, therefore, pursuant to the provisions of the Statute in such case made and provided, do hereby order and direct the said C. D., the person so refusing, to show cause before me at my office in the city of Troy in said county, on the tenth day of May instant at 10 o'clock in the forenoon, why he should not be compelled to deliver the same books and papers, (or either as the case may be.)

Signature.

Dated, &c.

No. 22.

AFFIDAVIT OF DELIVERY.

See *ante* p. 109.

STATE OF NEW YORK, }
County of Rensselaer, } ss :

C. D., of said county, being duly sworn, says, that he is the person mentioned and described as late commissioner of highways of the town of Pittstown, in said county, in a certain affidavit and complaint made by one A. B. before the Hon. C. R. INGALLS, Justice of the Supreme Court, on the tenth day of May, 1867, and that he has truly delivered over to his successor in said office of commissioner of highways, all the books, records and papers in his custody or appertaining to his said office, within his knowledge.

C. D.

Sworn, &c.

No. 23.

WARRANT TO COMMIT THE PERSON WITHHOLDING.

See *ante* p. 109.

The People of the State of New York, to the Sheriff of the County of Rensselaer :

Complaint having been made to the undersigned, as follows, to wit: [*Insert a copy of the complaint.*] Where-

upon, pursuant to the provisions of the statute, being satisfied by the oath of the said complainant (*add, and other testimony offered, if any such was offered*), that the said books and papers (*or either, according to the fact*) were withheld as aforesaid, the undersigned granted an order, directing the said C. D., the person so refusing, to show cause before the undersigned, at &c. (*as in the order*), why he should not be compelled to deliver the same books and papers (*or either, as the case may be*) at which place and time so appointed (*or if at any other time, to which the matter was adjourned, so state*), upon due proof being made of the service of the said order, the undersigned proceeded to inquire into the circumstances, and the said C. D. having omitted to make the oath prescribed by the statute in such case made and provided, and it appearing to the undersigned, that the said books and papers (*or either of them, to be described*) are withheld as aforesaid.*

Now, therefore, you are commanded that you take the said C. D., if he may be found in your bailiwick, and commit him to the jail of the said county of Rensselaer; there to remain until he shall deliver the said books and papers (*or either or such of them as are withheld*), or be otherwise discharged according to law.

Witness, C. R. I., justice of the Supreme Court, at the city of Troy, this tenth day of July, 1867.

Seal.

Signature.

No. 24.

SEARCH WARRANT FOR SUCH BOOKS OR PAPERS WITHHELD.

See *ante* p. 109.

The People of the State of New York, to the Sheriff of the County of Rensselaer, or to any Constable of any Town in said County :

[*As in the form above to.**] And the undersigned being required by the said complainant, A. B., to issue this warrant:

Now, therefore, you are commanded, in the day time, to search C. D.'s house, situated (*insert a particular designation or description of the said house, and of any other place to be searched*), for the said books and papers (or either of them, as the case may be), so withheld, and all other such books and papers as belonged to the said C. D., as commissioner of highways as aforesaid, in his official capacity, and which appertained to the said office of commissioner of highways, and seize and bring them before the undersigned.

Witness, C. R. I., justice of the Supreme Court, at the city of Troy, this tenth day of July, 1867.

Signature and Seal.

No. 25.

NOTICE OF APPOINTMENT OF OVERSEER.

See *ante p.* 112.

To E. J. WEATHERWAX,

Of the town of Pittstown :

Sir—Take notice that at a meeting of the commissioners of highways of the town of Pittstown, held at Tomhannock, on the third day of April, 1867, you were duly appointed by such commissioners overseer of highways for road district No. 8, of said town, which district includes the following territory: (*Insert Boundaries of District.*)

Yours, &c.,

ROYAL ABBOTT,

Town Clerk.

Dated, &c.

No. 26.

NOTICE OF ACCEPTANCE BY OVERSEER.

See *ante* p. 113.

TO ROYAL ABBOTT,

Town Clerk of the town of Pittstown :

Take notice that I hereby accept the office of overseer of highways, for road district No. 8, of said town.

Yours, &c.,

E. J. WEATHERWAX.

Dated, &c.

No. 27.

ASSESSMENT BY OVERSEER FOR SCRAPER OR PLOW.

See *ante* p. 119.

Whereas the commissioners of highways of the town of Ellicott, in the county of Chautauqua, on the 10th day of April, 1848, by writing under their hands, directed and empowered me, Henry Baker, overseer of highways of road district No. 5, in said town, to procure a good and sufficient iron [*or steel*] shod scraper and a plow, [*or either separately,*] for the use of my said road district, to be paid for by the moneys arising from commutations and fines within such district; and whereas such moneys are insufficient for the purpose, by the amount of \$8.50:

Now, therefore, I, the said overseer, according to the form of the statute in such case made and provided, do hereby assess the deficiency of eight dollars and fifty cents aforesaid, upon the inhabitants of the said district, in the proportion they are respectively assessed on the assessment roll of said town: which said assessment is as follows, viz:

Names of Inhabitants.	Town Assessment.	Overseer's Assessment.
Abner Hazeltine,-----	\$11 90	\$1 19
Horace Allen,-----	17 90	1 79

A. B.,

*Overseer of Dist. No. 5.*Dated *April* 15, 1848.

No. 28.

OVERSEER'S LIST OF PERSONS LIABLE TO DO HIGHWAY
LABOR.*See ante p. 119.*

The undersigned, overseer of highways for road district No. 3, of the town of Pittstown, hereby certifies that the following is a correct list of all the inhabitants in said district liable to work on the highways: Asa Shedd, Kingsley Worthington, Josiah Slocum, Byron Clark.

MARTIN BAUCUS,

Overseer.

Dated, &c.

No. 29.

OVERSEER'S ANNUAL ACCOUNT.

See ante p. 122, 146.

*To the Commissioners of Highways of the town of Pittstown,
Rensselaer County:*

The undersigned, overseer of highways of road district No. 8, in said town, pursuant to law, renders the following annual account:

1. The names of all persons assessed to work on the highways in said road district No. 8, are as follows:

APPENDIX OF FORMS.

443

Names.	No. of days.
John Jones,	5
Job Frost,	6

2. The names of all those who have actually worked on the highways, with the number of days they have worked, are as follows:

Names.	No. of days.
John Jones,	5
Job Frost,	4½

3. The names of all those who have been fined, and the sums in which they have been fined, are as follows:

Names.	Sums.
John Greer,	\$1 50
John Ross,	5 00

4. The names of those who have commuted are as follows:

Names.	Days.	Amount.
George Ingraham,	5	\$5 00

The manner in which the moneys, arising from fines and commutations, have been expended by me is as follows:

Whole amount received from fines and commutation, as above stated,		\$41 50
Expended for scraper, by order of com- missioners,	\$23 00	
Expended for repair of bridge over Muskrat Creek,	13 50	
	<hr/>	36 50
Leaving balance in my hands of		<hr/> \$5 00 <hr/>

5. The list of all persons whose names he has returned to the supervisor as having neglected or refused to work

out their highway assessments, with the number of days and amount of tax so returned for each person, is as follows: (*insert copy of list.*)

The list of all lands which he has returned to the supervisor for non-payment of taxes, and the amount of tax on each tract of land so returned, is as follows: (*insert copy of list.*)

MARTIN BAUCUS,

Overseer of Highways, Dist. No. 8.

Dated, &c.

RENSSELAER COUNTY, ss :

Martin Baucus, overseer of highways for road District No. 8, of the town of Pittstown in said county, being duly sworn says, that the foregoing account is, in all respects, true.

MARTIN BAUCUS.

Subscribed and sworn to before me this 6th day of March, 1867.

D. LANCASTER,

Com. of Highways.

No. 30.

COMMISSIONERS' LIST OF NON-RESIDENT LANDS.

See *ante* p. 127.

The following is a list and statement of the contents of all lots, pieces or parcels of land within the town of Grafton, in the county of Rensselaer, owned by non-residents therein. Made this third day of April, 1867, by the commissioners of highways of said town.

Description of Lands.	No. of acres.	Value accord- ing to last ass't roll.	No. of Road days. dist.
E. part, L. 14, T. 5, Range 12, A parcel of land bounded as follows: (<i>Insert boundaries minutely</i>),	1,500	\$15,000	17 6
Signatures.			

No. 31.

COMMISSIONERS' ASSESSMENT OF HIGHWAY LABOR.

See *ante* p. 125.

The undersigned commissioners of highways of the town of Pittstown, in the county of Rensselaer, having met at Johnsonsville, in said town, for the purpose of ascertaining, estimating and assessing the highway labor to be performed in said town the ensuing year; all the commissioners being present and having deliberated thereon (or all the commissioners having been duly notified to be present at this said meeting, for the purpose of deliberating thereon), do hereby ascertain, estimate and assess such labor as follows:

1. The whole number of days' work assessed for the year is *twelve hundred*, being at least three times the number of taxable inhabitants in said town.
2. Every male inhabitant above the age of twenty-one years (excepting ministers of the gospel and priests of every denomination, paupers, idiots and lunatics), there being *four hundred and fifty-three*, is assessed one day (or *two days, &c.*)
3. The residue of such work being *seven hundred and forty-seven* days, is assessed as follows, to wit:

Names.	No. of days.
Leonard J. Abbott.....	8
Troy & Boston R. R. Co.....	37
John Hunter.....	6
John Snyder.....	3

The lands in said town owned by non-residents are assessed as follows, to wit:

Description of lands.	No. of acres.	Val'n accord- ing to last assessment.	No. of days.	Road dist.
E. part L. 14, T. 5, range 12 (<i>or</i> a parcel of land bounded as follows : Insert boundaries) ...	1,500	\$15,000	17	6

In witness whereof, we have hereto set our hands this
1st day of April, 1867.

Signatures.

No. 32.

OVERSEERS' ASSESSMENT OF PERSONS OMITTED.

See *ante* p. 134.

The following named persons having been left out of the list of persons assessed to work on the highways in road district No. 3, in the town of Pittstown, in the county of Rensselaer, (*or having become inhabitants of road district No. 3 in the town of Pittstown, in the county of Rensselaer, since the list of assessments of highway labor for said district was made.*)

Now, therefore, I, Ruben Miller, overseer of highways of said district, according to the statute in such case made and provided, do hereby assess and rate the said persons in proportion to their real and personal estate, to work on the highways, as others are rated by the commis-

sioners on such list, subject to an appeal to the commissioners, which said assessment is as follows, viz:

George Brownell, four days.

James Kinnear, three days.

In witness whereof I have hereto set my hand this 9th day of April, 1867.

RUBEN MILLER,
Overseer.

APPEALS TO COMMISSIONERS FROM ASSESSMENT OF
OVERSEERS.

To the Commissioners of Highways of the town of Pittstown, in the county of Pittstown :

The undersigned having been assessed by the overseer of road district No. 3, in said town, four days' labor on the highway, on the ground that he is a new inhabitant of said district, (*or that his name has been omitted by the commissioners in said town,*) and conceiving himself aggrieved by said assessment does hereby appeal from said assessment so made by said overseer to the commissioners of highways of said town.

A. B.

Dated PITTSTOWN, *June 10th*, 1867.

No. 22.

APPEALS BY NON-RESIDENTS.

See *ante* p. 135.

TOWN OF PITTSTOWN, }
Rensselaer County, } ss.

A. B., a non-resident owner of lands in said town, considering himself (*or C. D., agent of A. B., a non-resident owner of lands in said town, who considers*) A. B. aggrieved in the assessment for highway labor by the commissioners of

highways of said town, upon the following described lands, to wit: (*here insert the description as in the list or statement made by the commissioners,*) doth hereby appeal from the assessment of said commissioners, to the honorable Jeremiah Romeyn, county judge of Rensselaer county, that being the county in which said lands are situated.

A. B.

or A. B. by C. D., *Agent*

Dated, &c.

No. 34.

COMMISSIONERS' CONSENT TO WORK IN ANOTHER DISTRICT.

See *ante p.* 138.

Whereas, A. B., a resident of road district No. 7, in the town of Hoosic, in the county of Rensselaer, is assessed six days' labor in district No. 3, in said town, for lands situate therein, therefore at his request we hereby approve of his applying the work so assessed in respect to such lands in said district No. 3, where the same is situated.

(Signed.)

Dated.

No. 35.

NOTICE TO AGENT OF NON-RESIDENT.

See *ante p.* 138.

To C. D., *Agent of A. B., a non-resident owner of lands in the town of Brunswick, in the county of Rensselaer:*

Take notice that A. B., a non-resident of the said town, is assessed four days' labor in road district No. 5, in said town, and that said labor is required to be performed on the road between the house of J. K. and Millville in said district, on the third day of May next and the day following.

Yours, &c.,

J. D., *Overseer.*

Dated, &c.

NOTICE IN CASE OF NON-RESIDENTS.

See *ante p.* 139.

Notice is hereby given, that the highway labor assessed on the following described parcels of land in the town of Lansingburgh, county of Rensselaer, owned by non-residents, is required to be performed from the 5th to the 12th days of June next, in road district No. 2 in said town, on the highway leading from—(*describe locality with reasonable accuracy.*)

Owner's names.	Description of lands.	Assessment.
Jared Rust.	N. pt., L. 10, 100 acres.	10 days.
	A. B., Overseer of Dist. No. 2.	

Dated, &c.

No. 36.

OVERSEER'S COMPLAINT FOR REFUSAL TO WORK, ETC.

See *ante p.* 142.

SENECA COUNTY, ss :

A. B., being duly sworn says, that he is overseer of highways of road district No. 9, in the town of Ovid, in said county; that on the 17th day of June, 1848, he gave C. D., who resides in said district, and is assessed to work on the highways therein, notice to appear on the 19th day of June aforesaid, with a (*state what kind of team or implements were required*) on the road, [*state where*] to do such work; and that the said C. D. did not appear nor furnish any one in his stead, (*or did not bring such team or implement as was required, stating it: or when he so appeared, was idle, or hindered others from working, or whatever the complaint is,*) and has not paid the commutation money

for said work, nor rendered a satisfactory excuse for such neglect.

A. B.

Subscribed and sworn to before me this 3d day of July,
1848.

T. R., *Justice of Peace.*

No. 28.

SUMMONS.

See *ante* p. 143.

SENECA COUNTY, ss :

To any constable of the town of Ovid, in said county:

Whereas A. B., overseer of highways of road district No. 9 in said town, has made complaint on oath before me, a justice of the peace of the said town, that C. D., a resident of said road district, and assessed to work on the highways therein, after being duly notified to appear on the 19th day of June, instant, with (*state what team or implements were required,*) to do such work; and that the said C. D., (*stating the matter of the complaint :*) and has not paid the commutation money nor rendered a satisfactory excuse.

You are, therefore, hereby required to summon the said C. D. to appear forthwith before me at my office in the said town, to show cause why he should not be fined according to law for such refusal, (*or neglect or misconduct.*)

G. H., *Justice of Peace.*

OVID, June 21, 1848.

No. 28.

CONSTABLE'S RETURN ON SUMMONS.

See *ante* p. 143.

The within summons personally served on Richard Roe, by reading the same to him, this 22d day of June, 1851.

JOHN DOE, *Constable.*

Or, I have served the within summons on Richard Roe, within named, by leaving a true copy thereof, this day, at his personal abode.

JOHN DOE, *Constable*.

June 22, 1851.

No. 39.

JUDGMENT THEREON.

See *ante p.* 143.

In the matter of the complaint of A. B., Overseer of Highways, <i>vs.</i> C. D.	}
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The said C. D. having been duly summoned to appear before me, J. B., the justice of the peace to whom the said complaint was made, to show cause why he should not be fined, according to law, for the refusal, (*or neglect, or misconduct*) set forth in said complaint; and no sufficient cause having been shown by said C. D., I do therefore impose upon the said C. D., a fine of *three dollars* for said offence, together with two dollars for the costs of the proceedings under the said complaint.

G. H., *Justice of Peace*.

Dated, &c.

No. 40.

WARRANT TO LEVY FINE.

See *ante p.* 143.

SENECA COUNTY, *ss* :

To any constable in the town of Ovid, in the said county:

You are hereby commanded to levy of the goods and chattels of C. D. *four dollars and eighteen cents*; being *one*

dollar for fine imposed by me, for [*specify the neglect or misconduct*], as set forth in the complaint of A. B, overseer of highways of road district No. 3 in the said town; and also *three dollars and eighteen cents*, for the cost of the proceedings on said complaint: and bring the said sum of money before me without delay.

G. H., *Justice of Peace.*

Ovid, June 23, 1851.

No. 41.

OVERSEER'S RETURN TO SUPERVISOR.

See *ante* p. 144

To the Supervisor of the town of Halfmoon, county of Saratoga:

The following is a list of all the resident land-holders residing in district No. 5, in the town of Halfmoon, Saratoga county, who have not worked out their highway assessment, or commuted for the same, with the number of days not worked or commuted for by each, at one dollar per day; and also a list of all the lands of non-residents and of persons unknown, which were taxed on my list, on which the labor assessed by the commissioners has not been paid, and the amount of labor unpaid at one dollar per day:

Owners' Names.	Descript'n of Lands.	Assessed Value	No. Days.	Am't.
John Reed,	E. pt., L. 14, range 14, T. 9, 75 acres.	\$400	3	\$3

NAHUM NEWCOMB,

Overseer of Dist. No. 5.

AFFIDAVIT TO SUCH LIST.

SARATOGA COUNTY, ss:

Nahum Newcomb being duly sworn, says, that he is overseer of highways of road district No. 5, in the town of Halfmoon, in the county of Saratoga, and that he has given the notices required by the thirty-second, thirty-third, and thirty-fourth sections of title 1, chap. 16, of part first of the Revised Statutes, and that the labor for which such persons and lands are returned, has not been performed.

I. M.

Subscribed and sworn to before me this 7th day of Sept. 1867.

J. D., *Justice of Peace.*

No. 42.

APPLICATION TO LAY OUT ROAD.

See *ante* p. 157.

To the Commissioners of Highways of the town of Clay, in the county of Onondaga:

The undersigned, residents of said town, (or owning lands in said town,) and liable to be assessed for highway labor therein, hereby apply to the said commissioners of highways to lay out a road in said town, commencing at the north-west corner of a lot of land in the possession of Abraham Rowan, and running, &c., (*describing the proposed road,*) which proposed road will pass through the inclosed, improved and cultivated lands of L. M., and M. O.

(Signed.)

No. 43.

NOTICE OF APPLICATION TO LAY OUT HIGHWAY.

See *ante pp.* 158, 167.

Notice is hereby given that the subscribers, persons liable to be assessed for highway labor in the town of Wilton, in the county of Saratoga, have applied to the commissioners of highways of the said town, to lay out a highway in said town, beginning (*insert a description of the proposed road*), which said highway is proposed to be laid through the improved lands of Daniel Coreal and John Ingerson, (*if necessary for identity, describe the particular lots*), and that twelve reputable freeholders of the town will meet on the *20th day of June instant, at 10 o'clock, A. M., at the dwelling house of Daniel Coreal*, to examine the ground through which the said highway is proposed to be laid.

Signed, &c.

Dated, &c.

No. 44.

ORDER FOR LAYING OUT A HIGHWAY.

See *ante p.* 159.

At a meeting of the commissioners of highways of the town of Wilton, in the county of Saratoga, at Doe's Corners, in the said town, on the 23d day of June, 1867, all the commissioners having met and deliberated on the subject matter of this order, (*or if but two of the commissioners met, say, all the commissioners having been duly notified to attend the said meeting, for the purpose of deliberating on the subject matter of this order*), upon the application of Daniel Gailor, a resident in said town,

and liable to be assessed to work on the highways therein for the laying out of the highway hereafter to be described, and on the certificate of twelve reputable freeholders of said town, convened and duly sworn after due public notice, as required by the statute, certifying that such highway is necessary and proper; and notice in writing, of at least three days, having been given in due form of law to S. M. and R. S., occupants of the lands through which such highway is to run, that the undersigned commissioners would meet at this time and place, to decide on the application aforesaid; and we having heard all reasons offered for and against laying out such highway, it is ordered, determined and certified that a public highway shall be, and the same is hereby laid out pursuant to said application, whereof a survey has been made and is as follows, to wit: beginning, &c., (*as in the survey*), and the line of said survey is to be the center of said highway, which is to be three rods in width.

Witness our hands this 23d day of June, 1867.

Signature.

No. 45.

CONSENT OF OWNER TO LAY HIGHWAY IN ORCHARD, &c.

See *ante* p. 160.

Whereas a highway is proposed to be laid out by the commissioners of highways of the town of Grafton, in the county of Rensselaer, on the application of William I. Baucus, commencing at (*insert description*), and which will run through my *orchard*; therefore, I do hereby consent that such road be so located, opened, worked and used through my said *orchard*.

Witness my hand and seal this 13th day of June, 1867.

A. B.

No. 46.

FREEHOLDERS' CERTIFICATE TO LAY OUT ROAD.

See *ante* p. 165.

COUNTY OF JEFFERSON, }
 Town of Brownville. } ss:

We, the undersigned, being freeholders of the town of Brownville, in said county, and not interested in the lands through which the highway hereinafter described is proposed to be laid, nor of kin to the owner thereof, having met on the day and date thereof, at Coila, in the said town, and having been first duly sworn, and having personally examined the route of the said proposed highway, and heard the reasons offered for or against the laying out a highway, pursuant to the application of E. F., commencing at, &c., (*here insert the description as in the application and notice,*) and which highway will pass through the improved (*or enclosed, or cultivated,*) lands of A. B. and C. D., do hereby certify to the commissioners of highways of said town, that we are of opinion that such highway is necessary and proper.

In witness whereof we have hereto subscribed our names the 10th day of August, 1865.

Signatures.

No. 47.

NOTICE TO OCCUPANT.

See *ante* p. 169.

To JOHN DOE:

Sir—Please to take notice that we, the undersigned, the commissioners of highways of the town of Duanesburgh,

in the county of Schenectady, shall meet at Jamesville, in the said town, on the 10th day of August, 1867, at 10 o'clock in the forenoon, to decide on the application made by Anson Benton, to us, to lay out a highway, commencing at, &c., (*here give the description as in the application,*) and which will pass through your enclosed (*or improved or cultivated*) lands; twelve freeholders having certified that it is proper and necessary to lay out said highway.

Signatures.

Dated, &c.

No. 48.

NOTICE TO R. R. Co., OF HIGHWAY ACROSS TRACK.

See *ante* p. 171.

To the Troy & Boston R. R. Co.:

Take notice, that the commissioners of highways of the town of Pittstown, in the county of Rensselaer, have duly laid out a highway, commencing at, (*insert description,*) and that said highway crosses the railroad track of your said company *five rods north of your depot at Johnsonsville*, and that said road will be opened for use after the expiration of thirty days from the service of this notice upon you. You are therefore required to cause the said highway to be taken across your said track, as shall be most convenient and useful for public travel, and to cause all necessary embankments, excavations and other work to be done on your road for that purpose, as by the statute provided.

Yours, &c.,

Dated, &c.

Signatures.

No. 49.

NOTICE TO REMOVE FENCES.

See *ante* p. 175.

Whereas, the undersigned, commissioners of highways of the town of Wilton, in the county of Saratoga, have laid out a public highway, by an order dated November 25, 1867, and duly filed with the town clerk of said town, which said road passes through enclosed lands, owned (*or occupied*) by you; and, whereas, our determination in the matter of laying out such road has not been appealed from: Now, therefore, please to take notice, that you are required to remove your fences from within the bounds of said highway, within sixty days after service hereof.

Yours, &c.

• Dated, &c.

No. 50.

ORDER TO ALTER ROAD.

See *ante* p. 180.

The undersigned commissioners of highways of the town of Pomfret, in the county of Chautauqua, having met at the dwelling house of John Bartlett, in the said town, to decide upon the application of Anson Reed, a resident of said town, liable to be assessed for highway labor therein, for the alteration of the road between the chair shop of Norman Neff and Shumla. All the said commissioners being present, and having deliberated (*or all the said commissioners having been duly notified to attend this meeting of the commissioners, for the purpose of deliberating*) on the subject of this order, do hereby order that the line of

the said road be. and the same is hereby so altered as to run from a point *thirty* feet south of the southeasterly corner of said *Neff's chair shop*, in a straight line; south, 13 degrees east, till it strikes the present center of the road, thence along the present line thirty rods, and thence continuing in a straight line sixty rods to the centre of the present road on the summit of the hill north of Shumla, the said line to be the center of the road, which shall remain of the width of three rods. And it is further ordered, that such parts of the present road as are not included in the above description be, and the same are hereby discontinued.

Dated, &c.

Signed, &c.

No. 51.

APPLICATION FOR THE ALTERATION OF A ROAD.

See *ante* p. 180.

*To the Commissioners of Highways of the town of Hector
in the county of Tompkins:*

The undersigned, residents. of said town (or owning, lands in said town), and liable to be assessed for highway labor therein, do apply to said commissioners to alter the highway leading from the house of Burton White to the Northern turnpike in said town, as follows: (*Insert particular description of the proposed alteration by known boundaries or objects, or courses and distances.*) The proposed alteration passes through lands which are not improved, enclosed or cultivated (or passes through the lands of John Doe and Samuel Johnson, who give their consent to said alterations.)

Dated, &c.

T. R.

C. D.

No. 52.

APPLICATION TO DISCONTINUE OLD ROAD.

See *ante* p. 183.

*To the Commissioners of Highways of the town of Volney,
in the county of Oswego :*

The undersigned, residents of said town, and liable to be assessed for highway labor therein, do hereby apply to you, the said commissioner, to discontinue the old road in said town, beginning, &c. (*insert general description*) on the ground that said road has become useless and unnecessary.

Signatures.

Dated, &c.

No. 53.

FREEHOLDERS' CERTIFICATE TO DISCONTINUE A ROAD.

See *ante* p. 185.

The subscribers, disinterested freeholders of the town of Corinth, in the county of Saratoga, having met at the dwelling house of Hiram Clothier, in the said town, in pursuance of a summons from the commissioners of highways of the said town, to examine and certify in regard to the propriety of discontinuing the highway from (*describe the highway to be discontinued*), and having been duly sworn, and having viewed the said road, do therefore certify that we are of opinion that the same is useless and unnecessary.

In witness whereof, we have hereto set our hands this 10th day of June, 1854.

Signatures.

No. 54.

ORDER FOR DISCONTINUING A ROAD.

See *ante p.* 183.

At a meeting of the commissioners of highways of the town of Carmel, in the county of Putnam, at Benton in said town, on the 14th day of December, 1867, all the commissioners having met and deliberated on the subject of this order, (*or all the commissioners having been duly notified to attend the said meeting, for the purpose of deliberating on the subject of this order*), upon the application of George White of said town, for the discontinuance of the road hereinafter described, and on the certificate of twelve disinterested freeholders, duly summoned and sworn, who have in due form certified that said road is useless and unnecessary; and the said commissioners having caused a survey of said road to be made as follows, viz: (*here insert the survey or description.*) It is ordered and determined by the said commissioners, that the said road be and the same is hereby discontinued.

In witness whereof, we have hereto set our hands this 9th day of June, 1856. .

Signatures.

No. 55.

AGREEMENT OF OWNER AND COMMISSIONERS AS TO
DAMAGES.

See *ante p.* 191.

Whereas, the commissioners of highways of the town of Pittstown, in the county of Rensselaer have, by an order dated the 10th day of January, 1868, laid out a highway in said town, beginning, (*describe it as in the*

order.) which said highway passes through the improved lands of John Clark: Now, therefore, the damages of the said John Clark, by reason of the laying out of said highway, are hereby ascertained by agreement of the said John Clark, and the said commissioners of highways, at the sum of *one hundred dollars*.

In witness whereof we, the said parties, have hereto set our hands this 12th day of January, 1868.

Signatures.

No. 56.

RELEASE OF DAMAGES BY OWNER.

See *ante* p. 191.

A highway having been laid out, on the day of the date hereof, by the commissioners of highways of the town of Rome, in the county of Oneida, on the application of John W. Tallmadge, through the improved land of me, Henry Palmer, commencing at, &c., (*insert the description of the road as in the order.*)

Now, know all men by these presents, that I, the said Henry Palmer, for value received, do hereby release all claim to damages by reason of the laying out and opening the said highway.

Witness my hand and seal the 1st day of December, 1867.

HENRY PALMER. (L. S.)

No. 57.

**APPLICATION TO COUNTY COURT TO APPOINT COMMISSIONERS
TO ASSESS DAMAGES.**

See *ante* p. 192.

To the County Court of Rensselaer County:

Whereas the commissioners of highways of the town of Pittstown, in said county, by an order dated September

20th, 1867, have laid out a highway in said town, beginning, (*insert description as in the order.*)

Now, therefore, we the undersigned commissioners of highways of the said town, do hereby apply for the appointment of commissioners to assess the damages occasioned by the laying out of said highway, pursuant to the statute in such case made and provided.

Dated, &c.

Signatures.

No. 57—A.

ORDER APPOINTING COMMISSIONERS TO ASSESS.

See *ante* p. 192.

At a term of the County Court, of Rensselaer County, held at the Court House in the city of Troy, in said county, on the 25th day of January, 1868:

Present—Hon. JEREMIAH ROMEYN, *County Judge*.

In the matter of the application of
the Commissioners of Highways of
the town of Pittstown.

On reading and filing the application of E. G., H. B., and N. B., commissioners of highways of the town of Pittstown, in said county, setting forth the laying out of a highway in said town, beginning, (*insert description*), and praying the appointment of commissioners to assess the damages occasioned thereby, it is ordered that F. G., H. J. and L. M., of said town, be and they are hereby appointed such commissioners, whose duty it shall be to take the oath of office prescribed by the constitution, and to proceed on receiving at least six days' notice of the time and place, to meet the said highway commissioners and take a view of the premises, hear the parties and such witnesses as may be offered before them, and to administer oaths to such witnesses; and they shall all meet and act,

and they or a majority of them shall assess all damages which may be required to be assessed on the said highway, and shall deliver their said assessment to the said commissioners of highways.

No. 58.

NOTICE OF MEETING OF COMMISSIONERS TO ASSESS DAMAGES.

See *ante p.* 193.

TO JOHN CARROLL:

Sir—Take notice that the commissioners appointed by the county court by an order bearing date on the 25th day of January, 1868, to assess the damages occasioned by a highway laid out by the commissioners of highways of the town of Pittstown, in the county of Rensselaer, beginning, (*insert description of road*), will meet for the purpose of making such assessment, at the house of Asa Shedd in said town, on the 13th day of February next.

Signature.

Dated, &c.

No. 59.

†

ASSESSMENT BY COMMISSIONERS.

See *ante p.* 197.

Whereas, the undersigned, Walker Gilbert, Daniel Gailor and Ira Wood were appointed by an order of the county court, of the county of Saratoga, made on the tenth day of September, 1867, on the application of E. G., H. B. and N. R., commissioners of highways of the town of Wilton, in said county, commissioners to assess the damages occasioned by the laying out of a highway in the said town, beginning, (*insert description as in the*

order.) which highway passes through the improved lands of Peter P. Deyoe, Daniel Coreal and John Ingerson, and was laid out by the commissioners of highways of the said town, by an order dated November twenty-fourth, 1867.

Now, therefore, we, the said commissioners, having taken the oath of office prescribed by the constitution, and having all met and acted on the matter committed to us, at the residence of Peter P. Deyoe, in said town, this twenty-fourth day of November, 1867, pursuant to a notice from said commissioners of highways, of at least six days, according to law, and having taken a view of the premises, and heard the parties and such witnesses as have been offered before us; do, thereupon, determine and assess the damages required to be assessed on the said highway, as follows, viz: We assess the damages of Peter Deyoe at one hundred dollars; we assess the damages of Daniel Coreal at one hundred and fifty dollars, &c.

Witness our hands this 24th day of November, 1867.

Signatures.

No. 60.

NOTICE WHEN THE COMMISSIONERS OR PARTIES ARE
AGGRIEVED OR DISSATISFIED.

See *ante* p. 198.

Notice is hereby given that I, John Myers, conceiving myself aggrieved by (*or we, the commissioners of highways, feeling dissatisfied with*) the assessment of damages made by Henry Fowler, H. Clay Bascom and John Serviss, commissioners appointed by the county court of the county of Rensselaer, to assess damages occasioned by the laying out of a highway in the town of Berlin, in said

county, beginning, (*insert description*,) which said assessment was filed in the office of the town clerk of the said town, on the 10th day of September, 1867, do hereby ask for a jury to reassess the said damages, and such jury will be drawn at the clerk's office of the town of Nassau, in said county, adjoining the said town of Berlin, on the 25th day of September, 1867, at ten o'clock in the forenoon of that day, by the town clerk of the said town of Nassau.

Signature.

Dated, &c.

No. 61.

NOTICE TO ADJOINING TOWN CLERK OF DRAWING OF JURY.

See *ante* p. 200.

To J. K., town clerk of the town of Nassau, in the county of Rensselaer:

Take notice that the undersigned, feeling himself aggrieved by the assessment of certain commissioners appointed by the county court of said county to assess damages occasioned by the laying out of a highway in the town of Berlin, in said county, and having asked for a jury to re-assess such damages, such jury will be drawn by you at the town clerk's office in said town of Nassau, on the 25th day of September, 1867, at ten o'clock in the forenoon of that day.

Signature.

Dated, &c.

No. 62.

TOWN CLERK'S CERTIFICATE OF DRAWING OF JURY.

See *ante* p. 200.

RENSSELAER COUNTY, ss:

I, J. K., town clerk of the town of Nassau, in said county, do hereby certify that the following twelve names

were this day drawn by me from a box containing the names of all such persons now residents of said town, whose names are on the last list filed in the town clerk's office, of said town, of those selected and returned as jurors, pursuant to the Revised Statutes, who are not interested in the lands through which a road in the town of Berlin, was laid out by the commissioners of highways of said last mentioned town, on the 25th day of July, 1851, nor of kin to either or any of the parties, and that the said twelve names were so drawn by me to make a jury to re-assess the damages occasioned by the laying out of the said highway.

A. B.,

E. F.,

C. D.,

G. H., &c.,

inserting the 12 names.

Witness my hand this 3d day of September, 1851.

R. P., *Town Clerk.*

№. 63.

SUMMONS FOR JURY.

See *ante p.* 200.

RENSSELAER COUNTY, ss:

To WALTER SCOTT, *one of the constables of the town of Nassau, in the said county:*

You are hereby directed to summon (*name the twelve persons*) to appear at Hoag's Corners, in the said town, on the 25th day of September, 1867, to make a jury to re-assess the damage occasioned by the laying out of a highway in the said town, by the highway commissioners thereof, on the 10th day of September, 1867. Hereof fail not.

Witness my hand this 3d day of September, 1867,

J. B., *Justice of Peace.*

No. 63—A.

OATH OF JURY.

You, and each of you, do solemnly swear, in the presence of Almighty God, well and truly to determine and re-assess such damages as shall be submitted to your consideration.

No. 64.

VERDICT OF REASSESSMENT.

See *ante* p. 201.

We, the subscribers, a jury duly drawn and sworn to determine and re-assess the damages occasioned by the laying out of a highway in the town of Hadley, in the county of Saratoga, by the highway commissioners thereof, on the 18th day of September, 1867, which said highway runs from (*describe the highway as in the order, and state whose lands it passes through*), having taken a view of the premises, and heard the parties and such witnesses as have been offered by them and sworn before us, do hereby determine and re-assess the said damages as follows, viz: We determine and re-assess the damages of H. B. at one hundred dollars. (*Specify each person's damages passed upon.*)

To be signed by the six Jurors.

SARATOGA COUNTY, ss:

I, J. B., the justice of the peace, by whom the within (*or above*) named jury were summoned, drawn and sworn, do certify that the within (*or above*) is the verdict of re-assessment rendered by the jury, pursuant to the said proceedings, this 28th day of September, 1867.

J. B., *Justice of Peace.*

No. 65.

APPEAL TO COUNTY JUDGE.

See *ante* p. 206.

To the Hon. JOHN C. HULBERT, *County Judge of Saratoga County:*

I, Burton White, of the town of Northumberland, in said county, conceiving myself aggrieved by the determination of the commissioners of highways of the town of Northumberland, in said county, made on the first day of August, 1865, in laying out (*or altering, discontinuing, refusing to lay out, alter or discontinue*) a highway in the said town, from, (*describe the road as in the order of the commissioners.*) upon the application of John Guy, do hereby appeal from the said determination of the said commissioners, and pray the appointment of referees, according to the form of the statute in such case made and provided, to hear and determine my said appeal.

The ground upon which this appeal is made, is that, (*here set forth the cause of complaint.*) and said appeal is brought to reverse entirely the determination of the commissioners, (*or if part only, then*) to reverse the determination, &c., *specifying the part sought to be reversed.*

Dated, &c.

BURTON WHITE.

No. 66.

NOTICE TO COMMISSIONERS, OF APPEAL.

See *ante* p. 210.

To A. B., C. D. and E. F., *Commissioners of Highways of the town of Pittstown, in the county of Rensselaer:*

Take notice, that I have appealed to the county judge of the said county of Rensselaer, from the determination

made by you on the first day of August, 1865, laying out, (*altering, or as the case may be,*) a highway in said town, beginning, (*insert description,*) and that said appeal is brought on the ground, &c., (*insert ground,*) and is brought to reverse entirely your said determination, (*or if part only,*) to reverse your determination in so far—specifying the parts to be reversed.

Dated, &c.

Signature.

No. 67.

APPOINTMENT OF REFEREES.

See *ante* p. 210.

RENSSELAER COUNTY, ss:

Whereas David A. Lancaster, of the town of Pittstown, in said county, has appealed from the determination of the commissioners of highways of the said town, made on the 30th day of December, 1867, in (*laying out, altering, discontinuing, refusing to lay out, alter, discontinue*) a highway in the said town, which highway is particularly described in the said appeal hereto annexed (*and, whereas Richard Bailey and John Smith have also appealed from the same determination of the commissioners, which said appeals are also hereto annexed*), and sixty days having elapsed after such determination has been filed in the office of the town clerk of the said town:

Now, therefore, I, Jeremiah Romeyn, county judge of the said county, to whom the said appeal was (*or appeals were*) addressed according to the form of the statute in such case made and provided, do hereby appoint James Monroe of the town of Schaghticoke, William Otis of the town of Lansingburgh, and Henry Myrtle of the town of Hoosic, three disinterested freeholders who have not been named by the parties interested in the appeal, and who

are residents of the county, but not of the town wherein the road is located, as referees, to hear and determine all the appeals that have been brought in relation to the said determination of the said commissioners.

Given under my hand this 3d day of June, 1867.

JEREMIAH ROMEYN.

No. 67—A.

APPOINTMENT OF REFEREES BY JUSTICE OF SESSIONS WHEN
JUDGE IS DISQUALIFIED.

See *ante* p. 206.

RENSSELAER COUNTY, *ss*:

Whereas, on the 10th day of June, 1867, C. D., of the town of Nassau, in the said county of Rensselaer, appealed to the Hon. A. B., county judge of the said county, from the order and determination of E. F., commissioner of highways of the said town, made on the 30th day of December, 1867, laying out (*altering, or as the case may be*) a highway in the said town, which highway is particularly described in the said appeal hereto annexed, and sixty days having elapsed after such determination has been filed in the office of the town clerk of the said town, and whereas the said county judge is a resident of said town of Nassau, (*or whatever the disability may be,*) now, therefore, in accordance with the statute in such case made and provided, I, the undersigned, one of the justices of the sessions of the said county of Rensselaer, do hereby appoint I. J., K. L. and M. N., all residents of the said county of Rensselaer, but not one of them residents of the said town of Nassau, referees to hear and determine the said appeal, (*or appeals.*)

Given under my hand this 10th day of March, 1868.

No. 68.

NOTICE TO THE REFEREES OF THEIR APPOINTMENT.

See *ante* p. 211.

To I. J., of, &c., K. L., &c., and M. N., of, &c.:

Take notice, that you have been duly appointed by me, as referees, to hear and determine an appeal made from the order and determination of E. F., commissioner of highways of the town of Nassau, in the county of Rensselaer, laying out (*altering, or as the case may be*) a highway in the said town, which highway is particularly described in the said appeal herewith delivered to you. And also that the papers herewith delivered are all the papers pertaining to the matter (*or matters*) referred to you as aforesaid. Dated the 10th day of March, 1868.

A. B., *County Judge,*
(or O. P., *Justice of the Sessions*
of Rensselaer County.)

No. 69.

OATH OF REFEREES.

See *ante* p. 214.

RENSSELAER COUNTY, ss :

We, the undersigned, I. J., K. L. and M. M., referees appointed to determine the appeal of G. H. (*or appeals of G. H., &c.*), from the order of the commissioners of highways, for altering (*or discontinuing, or as the case may be*) a highway in the town of Nassau, do severally, solemnly swear that we will faithfully hear and determine the said appeal (*or appeals*) referred to us. Signed.

Sworn at Nassau, in the county
of Rensselaer, the 14th day of
March, 1868, before me, }

JOHN GUY, *Justice of Peace.*

No. 70.

NOTICE BY REFEREES TO THE COMMISSIONERS OF HIGHWAYS.

See *ante* p. 211.

To E. F., C. D., AND J. G., *Commissioners of Highways
of the town of Pittstown, in the county of Rensselaer* :

Take notice that we have been duly appointed referees to hear and determine an appeal made to A. B., county judge of the county of Rensselaer, by C. L., of the town of Pittstown, from your determination contained in your order, made on the 10th day of July, 1867, and filed and recorded in the office of the town clerk of the said town, on the 13th day of July, 1867, refusing to lay out, &c. (*as in the appeal*); and that we shall attend at the house of M. N., in said town, on the 5th day of October next, at 10 o'clock in the forenoon of that day, to hear and determine such appeal.

Signed,

Dated, &c.

Referees.

No. 71.

NOTICE TO OCCUPANTS OF LAND.

See *ante* p. 212.

To A. B.:

Take notice that we shall attend at the house of J. R., in the town of Pittstown, in the county of Rensselaer, on the 6th day of October, 1867, at ten o'clock in the forenoon of that day, to hear and determine the appeal made by C. D., of said town, to G. L., county judge of the said county, from the order and determination of E. B., A. C., and D. L., commissioners of highways of the said town of Pittstown, made on the 3d day of April, 1867, and filed and recorded in the town clerk's office of the said

town, on the 16th day of April, 1867, refusing to lay out,
&c. (*as in the appeal.*)

Dated, &c.

Signed,

Referees.

No. 72.

**SUBPOENA FOR WITNESS TO ATTEND AND TESTIFY UPON AN
APPEAL.**

See ante p. 214.

TOWN OF OGDEN, }
Monroe County, } *ss:*

To E. F. AND J. K.:

You, and each of you, are hereby commanded, in the name of the people of the State of New York, to appear before the undersigned, referees, appointed by the county court of Monroe county, at the house of L. R. in the town of Ogden, county of Monroe, on the 3d day of July, 1867, at 10 o'clock in the forenoon, to testify respectively in a matter of a certain appeal from the decision of the commissioners of highways of the said town of Ogden to the said county court, and then and there to be heard on the part, and in behalf of E. F., appellant, (or of the said commissioners, as the case may be.)

Given under our hands this 20th day of June, 1867.

A. B. }
J. K. } *Referees.*
S. M. }

No. 73.

ORDER OF REFEREES DECIDING AN APPEAL.

See ante p. 221.

Whereas, Holloway Long, of the town of York, in the county of Livingston, on the 1st day of July, 1848,

appealed to the Hon. SCOTT LORD, county judge of said county, from the determination of the commissioners of highways of the said town, made on the 15th day of June, 1848, in (*laying out, altering, discontinuing, refusing to lay out, alter, discontinue*), a highway in the said town, which highway is particularly described in the said appeal hereto annexed, (*and whereas, Richard Bailey and John Smith, also appealed from the same determination of the said commissioners, which said appeals are also hereto annexed*), and whereas, after the expiration of sixty days after such determination had been filed in the office of the town clerk of the said town, the said county judge, according to the form of the statute in such case made and provided, appointed us, James Johnson of the town of Avon, Hiram Dennison of the town of Lima, and James S. Wadsworth of the town of Geneseo, three disinterested freeholders, who had not been named by the parties interested in the appeal, and who are residents of the county, but not of the town wherein the road is located, as referees, to hear and determine all the appeals that had been brought in relation to the said determination of the said commissioners, which said appointment is hereto annexed, and we having given notice pursuant to law, to the said commissioners of highways, (*and to John Rogers, an applicant for such road*) specifying the 25th day of August, 1848, as the time, and the dwelling house of Jacob Howe, in the said town of York, as the place, at which we would convene to hear the appeal, which notice was duly served at least eight days before the said time of convening, to wit: on the 16th day of August, 1848, and we having convened at the time and place specified in said notice, and before proceeding to hear said appeal (*or appeals*), having been duly sworn by an officer authorized to take affidavits to be read in courts of record, to wit: Robert Jones, Esquire, a justice of the peace of the said county,

faithfully to hear and determine the matters referred to us, have heard the proofs and allegations of the parties, and do thereupon order, determine and adjudge that the said determination of the said commissioners of highways, be and the same is hereby reversed (or affirmed, or reversed in so far (*stating part reversed*), and affirmed as to the residue, (*and, if the road is to be laid out by the referees add*), and we do further order and determine that the said highway be laid out in accordance with the application of the said A. B., and the same is hereby described as follows: (*insert description.*)

Witness our hands this 25th day of August, 1848.

Referees' Signatures.

No. 74.

AFFIDAVIT FOR CERTIORARI.

See *ante* p. 226.

RENSSELAER COUNTY, ss:

John Gay, being duly sworn, says that he is a resident of the town of Pittstown, in said county, and liable to be assessed for highway labor therein; that on the 3d day of July, 1867, G. L. and D. S., two of the commissioners of highways of the said town of Pittstown, on the application of E. C., made an order laying out a highway in said town, commencing, &c., (*insert description,*) which said order was filed and recorded in the town clerk's office of said town, on the 5th day of July, 1867, and is in the words and figures following, to wit: (*insert copy of order*) that the highway so laid out passes through the improved and cultivated lands of this deponent, and of M. N. and O. P. And this deponent further alleges that the said road so laid out, as aforesaid, was laid out without the certifi-

cate of twelve freeholders; and that W. D., one of the alleged freeholders who certified to the necessity and propriety of the said road, had, at the time of making such certificate, no legal title to any real estate. And this deponent further alleges, that the said order laying out the road, as aforesaid, was made by the above named two commissioners, without the intervention of G. D., one of the commissioners of highways of said town, and without any notice to him to attend the meetings of the commissioners for the purpose of deliberating on the subject of such order; and that the order laying out said road does not show that the said G. D. participated in the proceeding, or was notified to do so.

Sworn, &c.

JOHN GAY.

No. 75.

WRIT OF CERTIORARI.

See *ante* p. 227.

The People of the State of New York :

To A. W., J. W. and W. H., referees appointed by the county judge of Washington county, on the 3d day of June, 1867, to hear and determine the appeal of John McFarland and William McFarland, from the determination of the commissioners of highways of the town of Salem, in said county, in refusing to lay out a highway in said town.

We, being willing, for certain causes, to be certified of a certain decision made by you on a certain appeal of *John McFarland and William McFarland*, from the determination and decision of the commissioners of highways of the town of *Salem* in the county of *Washington*, aforesaid, in refusing to lay out a road in said town, under

and by virtue of the statutes made and provided, we command you, that the said appeal, together with the testimony given, and offered to be given, on the hearing thereof, with your decision thereon, with all things touching and concerning the same, by whatever names the parties thereto are called, before our Justices of our Supreme Court, at *the City Hall of the city of Albany*, on the first Monday of May next, (*time and place of the next general term*,) you send, under your hands, together with this writ; that our said court may further, thereupon, cause to be done therein, what of right ought to be done.

Witness, Charles R. Ingalls, one of the Justices of our Supreme Court; at the Court House in the city of Troy, this 10th day of January, 1868.

J. THOMAS DAVIS, *Clerk*.

BANKER & RISING, *Attys*.

(*Indorsed.*) On the application of Banker & Rising, counsel for the applicant, and on the affidavit of John Gay, dated the 3d day of July, 1867, I allow the within writ of certiorari to issue; and let said affidavit be filed in the office of the clerk of Rensselaer county.

C. R. INGALLS,

Just. Sup. Court.

NO. 76.

RETURN TO WRIT OF CERTIORARI.

See *ante* p. 228.

WASHINGTON COUNTY, ss:

By virtue of and in obedience to a writ of the people of the State of New York hereunto annexed, and directed and delivered unto us, A. B., E. D. and E. F., referees, appointed by the county judge of Washington county, on

the 3d day of June, 1867, to hear and determine the appeal of John McFarland and William McFarland, from the determination of the commissioners of highways of the town of Salem, in said county, in refusing to lay out a road in said town. We do hereby certify and return that on the 17th day of September, 1849, we were appointed, by the county judge of Washington county, referees, to hear and determine the appeals of William McFarland and John McFarland, from the order and determination of the commissioners of highways of the town of Salem, in refusing to lay out a highway in said town, which order and determination were made on the 5th day of July, 1849, and filed and recorded in the town clerk's office of said town of Salem, on that day, and that the order appointing us is in the words following, to wit: (*insert copy order appointing.*) We do further certify, that the appeal of the said William McFarland and John McFarland, and which was delivered to us by the said county judge, is in the words following: (*insert copy of appeal; proceed giving a detailed statement of every step taken, with copies of all orders, papers, evidence, &c.*)

In testimony whereof, we have respectively, to these presents, affixed our seals and subscribed our names this 20th day of July, 1820.

Signatures. [L. s.]

No. 77.

COMMISSIONER'S ORDER TO REMOVE ENCOACHMENTS.

See *ante* p. 237.

Whereas, a highway was laid out in the town of Wilton, in the county of Saratoga, on the 10th day of July, 1867, by the commissioners of highways of the said town (or by E. G., C. D., and E. F., referees, &c.), beginning (in-

sert description as in the order, including a statement of the width of the road), which road is encroached upon by the fence of Reuben Conkrite, to the extent of (state how much), on the north side (describe where.)

Now, therefore, we, the commissioners of highways of the said town (*state the attendance of, or notice to all the commissioners, unless they all sign the order*), do hereby order that such fence be removed, so that such highway may be of the breadth originally intended.

Dated, &c.

Signatures.

№. 78.

NOTICE TO REMOVE ENCROACHMENT.

See *ante* p. 237.

To Mr. REUBEN CONKRITE :

Sir—Please to take notice that an order, of which the annexed is a copy, has been duly made by the commissioners of highways of the town of Wilton, in the county of Saratoga, and that you are hereby required to remove the fence therein specified, as encroaching upon the highway, within sixty days after service hereof.

Dated, &c.

Signatures.

№. 78—A.

NOTICE TO REMOVE FENCES.

To Mr. JOHN DOE:

Whereas, the undersigned commissioners of highways of the town of Lima, in the county of Livingston, have laid out a public highway, by an order, dated July 23d, 1851, and duly filed with the town clerk of the said town, which said road passes through enclosed lands, owned (or

occupied) by you; and whereas our determination in the matter of laying out such road has not been appealed from—

Now, therefore, please to take notice that you are required to remove your fences from within the bounds of said highway, within sixty days after service hereof.

Yours, &c.,

Signed,

Dated, &c.

Commissioner of Highways.

№. 79.

DENIAL OF ENCROACHMENT.

See *ante* p. 243.

To the Commissioners of Highways of the town of Pittstown, in the county of Rensselaer :

Take notice that I hereby deny that the fences mentioned in the order and notice heretofore served on me, and dated June 3d, 1867, encroach upon the highway mentioned in said order and notice.

Yours, &c.,

Dated, &c.

G. W.

APPLICATION TO JUSTICE THEREON.

See *ante* p. 243.

To T. R., Justice of the Peace of the town of Pittstown, in the county of Rensselaer :

An order having, on the 3d day of June, 1867, been made by the commissioners of highway of the said town of Pittstown, of which the following is a copy (*insert copy*), and notice of said order having been duly served on A. B., one of the persons named therein, and through

whose land said highway runs, requiring him to remove within sixty days according to said order, his fences therein mentioned as an encroachment upon the said highway, and said A. B., having in writing denied that said fences encroached on said highway, therefore, I, E. G., one of the commissioners of highways of the said town of Pittstown, do hereby apply to you, T. R., one of the justices of the peace of said county of Rensselaer, for a precept, directed to any constable of the said town of Pittstown, to summon twelve freeholders thereof, to meet on the 5th day of September, 1867, at the dwelling house of M. N., in said town, to inquire into the premise, according to the statute in such case made and provided.

Dated, &c.

Signature.

SUMMONS TO FREEHOLDERS IN CASE OF ENCROACHMENT.

See *ante* p. 243.

ONEIDA COUNTY, ss:

To any constable in the town of Camden, in the said county:

You are hereby commanded to summon twelve freeholders of said town to meet on the 5th day of July, 1867, in the dwelling house of E. J., in said town to inquire into the matter of an alleged encroachment upon the highway in said town leading from [*here describe the place and the alleged encroachment, as in the order*] and you are to give at least three days' notice to the commissioner of highways of said town and to C. D., of the time and place at which such freeholders are to meet.

J. W.,

Dated, &c.

Justice of the Peace.

No. 80.

OATH OF JURY.

See *ante* p. 243.

You and each of you do solemnly swear, that you will well and truly inquire whether any encroachment has been made, and by whom, on the highway now in question.

OATH TO WITNESS.

You do swear, that the evidence you shall give, in relation to the encroachment on the highway now in question, shall be the truth, the whole truth, and nothing but the truth.

CERTIFICATE OF JURY WHEN ENCROACHMENT IS FOUND.

See *ante* p. 244.

ONEIDA COUNTY, ss,

The undersigned, freeholders of the town of Camden, in said county, having met on the day of the date hereof, at the dwelling house of E. J., in said town, pursuant to a summons from J. W., Esq., a justice of the peace of the said county, to enquire into the matter of an alleged encroachment on the highway, in said town; specified in an order of the commissioners of highways of said town, dated January 3d, 1867, a copy whereof is hereto annexed, having been duly sworn, and having heard the proofs and allegations which were submitted, do certify* that an encroachment on the said highway has been made, and that the same was made by John Jones, the present occupant (or by *Samuel Smith, a former occupant.*)

Witness our hands this 13th day of July, 1867.

Signatures.

CERTIFICATE WHEN NO ENCROACHMENT IS FOUND.

(*As above to *, continuing,*) that no encroachment has been made, as was alleged, and we also ascertain and certify the damages which John Jones, the present occupant, has sustained by these proceedings at *ten dollars*.

Witness our hands this 13th day of July, 1867.

Signatures.

No. 81.

NOTICE OF APPLICATION TO SUPERVISORS.

See ante p. 266.

Notice is hereby given that the undersigned, E. G., of the town of Pittstown, in the county of Rensselaer, will apply to the board of supervisors of said county, at their next annual meeting to be held at the court house in the city of Troy, in said county, on the 3d day of December, 1868, to cause to be levied, collected and paid to the treasurer of the said county of Rensselaer, such sum of money as may be necessary to construct and repair bridges in said county, and to prescribe upon what plan and in what manner the moneys so raised shall be expended.

Dated, &c.

G. G.

No. 82—A.

COMPLAINT OF OVERSEER ON SEIZURE OF CATTLE.

See ante p. 329.

Asa Shedd of the town of Pittstown, in the county of Rensselaer, makes complaint to Theodore C. Richmond, one of the justices of the peace in said town, and alleges that this complainant is overseer of road district, No. 3,

in said town; that on the 3d day of July, 1867, this complainant found running at large in the highway leading from the northern turnpike to John Sherwood's, in said road district, one deep-red cow, blind in the left eye; that thereupon this complainant, as such overseer, seized* and took into his possession said cow, and keeps the same to be disposed of according to law. That this complainant has no knowledge, information or belief, as to who is the owner of said cow. This complainant, therefore, prays said justice to issue a summons, under his hand, requiring the owner of said cow, or any party having an interest in the same, to show cause, before such justice, why said animal should not be sold, and the proceeds applied as directed by the statute in such case made and provided.

ASA SHEDD.

RENSSELAER COUNTY, ss:

Asa Shedd, the above complainant, being duly sworn, says, that the facts set forth in the above complaint are true.

ASA SHEDD.

Sworn to before me this 5th }
day of July, 1867. }

THEODORE C. RICHMOND,

Justice of Peace.

No. 32.

COMPLAINT OF OWNER OR OCCUPANT OF LANDS ON SEIZURE
OF CATTLE.

See ante p. 329.

William Tillinghast of the town of Pittstown, in the county of Rensselaer, makes complaint to Theodore C.

Richmond, one of the justices of the peace of said town, and alleges that he is the owner (or occupant) of land in said town. That on the 6th day of September, 1867, he found in the highway leading from the northern turnpike to John Sherwood's, and opposite to the land so owned (or occupied) by him, (or found trespassing on the premises so owned (or occupied) by him), one bay horse about the age of eight years, lame in the left hind leg; that, thereupon, he seized, &c., (*proceed as in the above form from the*.*)

No. 88.

SUMMONS.

See *ante* p. 330.

RENSSELAER COUNTY, ss:

Whereas, Asa Shedd, overseer of highways of road district No 3, in the town of Pittstown, in said county, has made complaint, on oath, before me, a justice of the peace of said town, that he has seized and taken into his possession, and keeps to be disposed of according to law, one *red cow, blind in the left eye*, found running at large in the highways in his said road district, contrary to the statute in such case made and provided. Therefore, the owner of said animal, or any party having an interest in the same, is hereby required to show cause, before me, at my office in said town, on the 20th day of July, 1867, why said animal should not be sold, and the proceeds applied as directed by "An act to prevent animals from running at large in the public highways, passed April 23, 1862," and the acts amending the same.

Given under my hand this 5th day of July, 1867.

THEODORE C. RICHMOND,

Justice of the Peace.

No. 84.

WARRANT FOR SALE OF ANIMALS.

See *ante* p. 331.

RENSSELAER COUNTY, ss:

To any Constable in the town of Pittstown, in said county:

You are hereby commanded to sell at public auction, for the best price you can obtain therefor, one red cow, blind in the left eye, heretofore seized and taken into possession by Asa Shedd, overseer of highways of road district No. 3, of said town, and now in his possession, and make return thereof to me, at my office in said town, on the 5th day of August, 1867.

Given under my hand this 20th day of July, 1867.

THEODORE C. RICHMOND,

Justice of the Peace.

No. 85.

CONSTABLES RETURN OF SALE.

See *ante* p. 331.

RENSSELAER COUNTY, ss:

To THEODORE C. RICHMOND, one of the Justices of the Peace, of the town of Pittstown, in said county:

I, William Gray, one of the constables of said town, and to whom was delivered a certain warrant, issued by you, and directed to any constable of the said town of Pittstown, commanding him to sell, &c., (*as in the warrant*) do hereby certify and return, that by virtue of said warrant I did, on the 28th day of July, 1867, having given at least five days' public notice of the time and place of such sale, sell at public auction in said town, the red

cow mentioned and described in said warrant, to John Doe, for the sum of fifty-nine dollars, he being the highest bidder, and that being the highest price bid therefor.

WILLIAM GRAY,

Dated, &c.

Constable.

No. 84.

APPEAL FROM DECISION OF JUSTICE.

See *ante* p. 334.

JUSTICE'S COURT:

In the matter of the application
of ASA SHEDD, overseer of Highways. }

Take notice that I appeal to the county court of Rensselaer county, from the finding or determination of Theodore C. Richmond, justice of the peace of the town of Pittstown, in said county, made on the 20th day of July, 1867, that cause existed for the sale of *one red cow, blind in the left eye*, alleged to have been found running at large in the public highways of road district No. 3 of said town, and seized and taken into possession by Asa Shedd, overseer of highways of said road district, and that the following are the grounds upon which this appeal is founded:

That the justice erred in refusing to dismiss the proceedings, as the defendant requested, on the ground that the summons, issued by him therein, had not been served as required by law, &c.

The justice is hereby required to return all the evidence and proceedings in the matter, and to certify that he has done so.

JOHN HUNTER, *Appellant.*

Dated, &c.

TO THEODORE C. RICHMOND, *Justice*, and

ASA SHEDD, *Complainant.*

No. 87.

APPLICATION FOR A PRIVATE ROAD.

See *ante p.* 345.

*To the Commissioners of Highways of the town of Mendon,
in the county of Monroe :*

The subscriber, a resident of said town, and liable to be assessed for highway labor, hereby makes application to you to lay out a private road for his use, beginning, &c. (*insert description, specifying its width and location, courses and distances*), that said road runs through the lands of Henry Barton and John Jones.

Dated, &c.

A. B.

No. 88.

NOTICE TO OWNER OR OCCUPANT.

See *ante p.* 345.

To LEMON GRIPPEN:

Please take notice that on the 20th day of July, 1868, at 10 o'clock in the forenoon, at the house of James Forbes, in Wilton, a jury will be selected for the purpose of determining upon the necessity of the road asked for in the application of which a copy is annexed, and to assess the damages by reason of opening the same.

Signatures,

Dated, &c.

Commissioners.

No. 89.

CERTIFICATE OF JURY, UPON APPLICATION FOR A PRIVATE ROAD.

See *ante p.* 347.

We, the undersigned, being disinterested freeholders of the town of Green, in the county of Erie, having met on

the 23d day of May, in the year 1867, at the residence of Anson Boice, in said town, having been duly sworn, well and truly to examine and certify with regard to the necessity and propriety of the road described in the annexed application of A. B., and having viewed the lands through which it is proposed to be made, do certify, that in our opinion it is necessary and proper to lay out a private road for the use of the said A. B., pursuant to his said application, and we do assess the damages as follows: to John Hall, \$100.

In witness whereof, we have hereunto subscribed our names, this 23d day of May, 1867.

P. W.,
S. T., &c.

No. 90—A.

ORDER FOR LAYING OUT A PRIVATE ROAD.

See *ante p.* 247.

At a meeting of the commissioners of highways of the town of Mendon, in the county of Monroe, at the residence of Anson Boice, in the said town, on the 23d day of November, 1867, all the said commissioners having met and deliberated on the subject of this order, [*or if but two of the commissioners met, say,* all the said commissioners having been duly notified to attend the said meeting, for the purpose of deliberating on the subject of this order,] upon the application of A. B., for the laying out of the private road hereafter described, and on the certificate of twelve reputable freeholders of said town, convened and duly sworn, after due notice to the owner [*or occupant*] of the lands through which said road is to pass, as required by the statute, certifying that such road was necessary: It is therefore ordered and determined by the said commis-

sioners, that a private road be laid out for the use of the said A. B., pursuant to his application, the courses and distances whereof, according to a survey thereof which the said commissioners have caused to be made, are as follows: (*insert the survey.*) And it is further ordered, that the line above described, shall be the center of said road, and that said road shall be of the width of two rods.

In witness whereof, we have hereunto subscribed our names, this 23d day of Nov., 1867.

A. B., }
C. D., } *Commissioners.*
E. F., }

No. 91.

ADDITIONAL ASSESSMENT BY OVERSEER.

See *ante p.* 136.

Whereas I, Asa Shedd, overseer of road district No. 2, in the town of Pittstown, and county of Rensselaer, do not deem the labor assessed on the inhabitants of said road district by the commissioners of said town of Pittstown, for the year 1866, sufficient to keep the roads in said district in repair.

Therefore, I do hereby further assess the following named persons—actual residents in said district—the amount of labor set opposite their respective names being in the same proportion as near as may be, and not to exceed one-third of the number of days assessed in the same year by the said commissioners on the inhabitants of said district:

Names.	Days.	Names.	Days.
James Holt.....	6	John Jones.....	4

Witness my hand this 5th day of June, 1860.

ASA SHEDD, *Overseer.*

INDEX.

ABATEMENT of actions by or against commissioners.....	99
of obstructions and encroachments	253
ABANDONMENT of highways	183
by non-user.....	187
description of road abandoned.....	188
effect of	188
ACCOUNT of commissioners to town auditors ..	86
annual, of overseers	122
ACTION by or against commissioners of highways	96
title of	98
against successors of commissioners.....	98
abatement of	99
commissioners may employ counsel in.....	99
for special damages from encroachments	256
against railroad companies by commissioners.....	301
ALTERING highways, proceedings on.....	180-183
APPLICATION to lay out roads, who may make.....	82
to alter road.....	180
to discontinue road.....	183
for commissioners to assess damages.....	192
APPEAL by non-residents from assessment of commissioners.....	135
from order of commissioners laying out, altering, etc., highways...	206
who may appeal.....	207
to what judge.....	208
within what time.....	208
form of	209
notice to commissioners of	210
appointment of referees on.....	210
proceedings of referees on.....	211-215
powers and duties of referees on.....	215-220
decision of referees on, and its effect.....	221, 222
commissioners to carry out decision of referees on.....	222
effect of.....	223
referees' fees on.....	223
in what cases does not lie	224
by <i>certiorari</i>	225-229

APPEAL from verdict of jury, finding encroachment	246
from decision of freeholders laying out private roads	349
ASSESSMENT of highway labor	125
who liable to	125
non-resident	126
non-residents, how assessed	127
how commissioners to proceed in making	129
of corporations	131
in case of private roads	132
when to be separate	132
on plankroads	132
where assessors have omitted to assess	133
lists of, to be filed	134
copies of, to be delivered to overseer	134
overseer to assess persons omitted	134
appeals by non-residents from assessment	135
tenants to deduct	135
errors in, how corrected	136
where not sufficient overseers may in- crease	136
of damages on laying out road	190
when compensation to be made	190
by agreement	191
how assessed	191-198
what damages to be allowed	194
proceedings for re-assessment	198-203
damages to be audited by supervisors	203
damages and expenses, how collected	204
<i>certiorari</i> of proceedings	205
BONDS, commissioners to give	64
BOOKS, delivery of by commissioners, how compelled	108
BOUNDARIES by highways	33-36
by rivers	36-38
BRIDGES are highways	9
who bound to repair	10-14
what are deemed public	10-12
over private race-ways, canals, etc.	10
dedication of	57
when private individuals are to repair	10-13
when commissioners to repair	71, 78
when overseers to repair	117
erection and repair of	260
towns charged with repairs of	260
liability of commissioners for repairs of	261
what bridges commissioners to repair	262
commissioners may construct new bridges	263
notice on	263
injuries to	264
how money provided for repairs of	264

BRIDGES when built or repaired at the expense of county.....	265
how repaired where damaged or destroyed	267
how repaired between adjoining towns	269-275
toll	275
may be highways	13
liability for repairs of.....	275
when to be rebuilt.....	276
indictment of.....	277
injuring or passing gate.....	277
notice on.....	277
when to become highway	277
companies how incorporated.....	278-288
over canals	288
BUSINESS , owner of fee cannot carry on in highways.....	32
BUILDINGS , highways through.....	83, 162
CATTLE GUARDS at railroad crossings.....	302
CATTLE depasturing in highways	26
in highways.....	327
not to run at large.....	328
duty of overseer	329
penalty for suffering cattle to run in highway.....	329
CATTLE , seizure of cattle running at large.....	329
proceedings on such seizure	329-335
CERTIORARI of proceedings to assess damages.....	205
of proceeding of referees on appeal.....	225-229
CITIES , liability of, for neglect to repair streets.....	76-78
duty of, in repairing sidewalks.....	309
COMMISSIONERS special, to lay out roads	178
to assess damages on laying out road.....	191-198
COMMISSIONERS OF HIGHWAYS ,	
election and qualification of.....	60
to take oath	61
penalty for refusing to serve.....	61
number and term of office.....	62
vacancy, how filled.....	62
how long to hold office.....	62
to administer oath	62
number, how changed.....	63
appointment to fill vacancy	63
to give bond.....	64
bond of, how prosecuted.....	64
when to meet	65
resignation of.....	65
general powers and duties of.....	65
to have care and superintendence of highways.....	66, 67
to direct repairs	68
to regulate and alter highways.....	68
to cause roads to be ascertained, described and entered of record...	69
to cause bridges and highways to be kept in repair	71

COMMISSIONERS OF HIGHWAYS,

not bound to repair without funds	73
liability of, for not repairing	73, 75
indictment of, for not repairing	75, 255
when to repair bridges	9, 78
to divide town into road districts	79
to assign inhabitants to such districts	79, 80
to require overseers to warn persons to work	80, 137
to lay out and discontinue roads	81, 156
to account to town auditors	86
how to raise money for repair of roads and bridges	88, 292
to appoint overseers	92
to prosecute overseers for neglect of duty	94
to fill vacancy in office of overseer	93
to cause mile-stones and guide-posts to be erected	94
may cause scrapers and plows to be purchased	94
are fence viewers	95
duty in case of fire in forest	95
when two may act	83, 95, 157
actions by, or against	96, 101
title of action, by or against	98
action against successors	98
abatement of actions, by or against	99
may employ counsel	99
actions by, on securities for penalties	100
on note for funds loaned	100
on bonds of indemnity	100
judgment by or against, how collected	101
may consent to use of highway by railroad company	101
may agree with plankroad or turnpike company for use of highway	103
mandamus against	104, 107, 262
injunction against	107
to deliver books, papers and moneys to successors	
roads, how laid out	81, 156
application	82, 157
survey	159
consent of owners when necessary	82, 160
through orchards	81, 161
through building, etc.	82, 162, 165
oath of freeholders when necessary	165
across railroad tracks	171
between different towns or counties	172
along division lines	175
to cause fences to be removed	175
to cause road to be opened and worked within six years	176
proceedings of, on altering highways	180
proceedings of, on discontinuing highways	85, 183, 189
to cause damages to be assessed on laying out highways	190
proceedings on assessment of damages	190-205

COMMISSIONERS OF HIGHWAYS,	
appeal from decision of, in laying out highway	206
proceedings of, on assessment of highway labor	125-136
duty and liability of, for repair of bridges	261
may construct new bridges	263
COMMUTING for highway labor	139
CONSENT of owner to lay out road when necessary	160
oral to lay out road	82, 160
when revocable	161
CORPORATION , assessment of, for highway labor	131
notice to work	139
may commute	140
penalties against, how collected	146
CUL DE SAC , meaning of	3
may be a highway	3-6
DAMAGES , how assessed on laying out highways	191-198
re-assessment of, on laying out highways	198
assessed on laying out highways, to be audited by supervisors	203
assessed, how collected	204
DEDICATION , definition and nature of	46
what right public acquire by	46, 58
who may make	47
trespasser cannot	47
tenant cannot	47
how proved	48-52
what length of time raises presumption of	48-51
presumption of, how rebutted	52
depends on intention	53
how accepted by the public	54-57
of bridges	57
effect of	58
when the owner may revoke	59
DEED , boundaries in, by highways	33-36
by rivers	36-38
DEPASTURING highways, law concerning	26, 337
DISCONTINUING HIGHWAYS, certificate of freeholders necessary	85
proceedings on	183-187
by non-user	187
description on	188
effect of	188
EJECTMENT , owner of fee may maintain	23
ENCLOSURE , road not to be laid through	160, 163
ENCROACHMENTS , by fences	237
how removed	237
penalty for not removing	238
proceedings	238
highway must have been laid out	240
proof of laying out	241
where highway is discontinued	242

ENCROACHMENTS, by fences, how penalty collected.....	242
plea of title	242
where encroachment is denied.....	243
proceedings on trial.....	244
right of appeal.....	247
judgment on appeal	247
when fences to be removed.....	248
by fallen trees.....	248
penalty for, under the statute.....	251
abatement of.....	253
indictment for.....	254
EXTRA VIAM, when travellers may go.....	2, 323
law of confined to highways.....	2, 344
FEEES of commissioners of highways	110
FEE, rights of owner of.....	21-26
in cities	21
presumed to be in adjacent owner.....	22, 33
presumption, may be rebutted.....	22
title of owner of, absolute subject to easement.....	22
owner of, may sell	23
may have action of trespass.....	23
may have action of ejectment.....	23
when owner of may sink water course.....	24
liability of owner of for excavations in highways.....	24
owner of, may remove soil in highways.	25
entitled to trees	26
in turnpikes, plankroads and railroads	30
owner of cannot carry on business in highway.....	32
remedy of owner of for trespass by railroad.....	297
FENCE VIEWERS, commissioners are	95
FENCES, removal of on laying out roads.....	175, 223
encroachment by.....	237, 252
FERRIES, when highways	14
FIRE in forest, duty of commissioners on.....	95
FIXTURES, road not to be laid through.....	160, 163
FORMS, oath of commissioners.....	425
certificate of justice	425
bond of commissioners.....	426
affidavit of justification.....	427
acknowledgment	427
approval of supervisor.....	428
notice of commissioners' resignation	428
order appointing commissioner to fill vacancy.....	428
order ascertaining and describing road.....	429
order dividing town into road districts	430
commissioners' annual account.....	431
statement and estimate for supervisor	432
notice of application for additional appropriation.....	432
order appointing overseer.....	433

FORMS, order appointing overseer in case of vacancy	433
complaint to commissioners against overseer.....	434
security for prosecuting overseer	435
consent for railroad to cross highway.....	435
agreement to use highway for plankroad.....	436
complaint to compel delivery of books, &c.....	436
order thereon.....	437
affidavit of delivery of books.....	438
warrant to commit person withholding.....	438
search warrant for books, &c.....	439
notice of appointment of overseer	440
notice of acceptance by overseer	441
assessment by overseer for scraper or plow.....	441
overseers' annual account.....	442
commissioners' list of non-residents' lands.....	444
commissioners' assessment of labor.....	445
overseers' assessment of persons omitted	446
appeal from assessment of overseer.....	446
appeal by non-residents.....	447
additional assessment by overseer	491
commissioners' consent to work in another district.....	448
notice to agent of non-resident	448
notice in case of non-residents	449
overseers' complaint for refusal to work	449
summons thereon.....	450
constable's return on summons	450
judgment thereon	451
warrant to levy fine	451
overseers' return to supervisor.....	452
application to lay out road.....	453
notice of.....	454
order laying out road.....	454
consent of owner.....	455
freeholders' certificate.....	456
notice to occupant.....	456
notice to railroad of highway across track.....	457
notice to remove fences.....	458
order to alter road	458
application to alter road	459
application to discontinue road.....	460
freeholders' certificate to discontinue road	460
order to discontinue a road.....	461
agreement of owner and commissioners as to damages.....	461
release of damages by owner.....	462
application to appoint commissioners to assess damages	462
order appointing commissioners to assess.....	463
notice of meeting of commissioners to assess.....	464
assessment of damages.....	464
notice remanding jury to re-assess.....	465

FORMS, notice to town clerk of drawing of jury	466
town clerk's certificate of drawing of jury.....	466
summons for jury to re-assess.....	467
oath of jury.....	468
verdict of re-assessment.....	468
appeal to county judge from order laying out, &c., road.....	469
notice to commissioners of appeal.....	469
order appointing referees.....	470
by justice of sessions.....	471
notice to referees of appointment.....	472
oath of referees.....	472
notice to commissioners of highways.....	472
notice to occupants of land.....	473
subpoena to witness.....	474
order deciding appeal.....	474
affidavit for <i>certiorari</i>	476
writ of <i>certiorari</i>	477
return to writ.....	478
commissioners' order to remove encroachments.....	479
notice to remove encroachments.....	480
notice to remove fences.....	480
denial of encroachment.....	481
application to justice thereon.....	481
summons to freeholders in case of encroachment.....	482
oath of jury.....	483
oath to witness.....	483
certificate of jury finding encroachment.....	483
no encroachment.....	484
notice of application to supervisors.....	484
complaint of overseer on seizure of cattle.....	484
complaint of owner of lands on seizure of cattle.....	485
summons on seizure of cattle.....	486
warrant for sale of cattle.....	487
constable's return of sale.....	487
appeal from decision of justice.....	488
application for private road.....	489
notice to owner or occupant.....	489
certificate of jury.....	489
order laying out private road.....	490
additional assessment by overseer.....	491
FREEHOLDERS, oath of, on laying out road	166
who are.....	166, 184
certificate of, on laying out road.....	166, 170
proceedings of, on laying out road.....	167, 168
not to be paid.....	169, 185
on discontinuing road.....	184
proceedings of.....	185
petition of to build or repair bridge.....	270
GARDENS, roads not to be laid through	160, 162

GATES, swinging, how erected and preserved.....	249, 251
GUIDE POSTS, to be erected.....	94, 118
penalty for injuring.....	118
HIGHWAYS, definition of.....	1
when foundrous or impassable.....	2
unenclosed lands adjoining.....	3
<i>cul de sac</i> , when may be.....	3-6
street in city is.....	6
turnpike and plankroads may be.....	7
railroad, when is.....	8
bridge may be.....	9-14
ferries, when.....	14
navigable river is.....	15
concerning the fee in.....	21-22
rights of public in.....	21-26
rights of owner of fee.....	21-26
depasturing.....	26
how far public may use.....	28
carrying on business in.,.....	32
ownership of lands adjoining.....	33
boundaries by.....	33-36
when the fee of passes.....	34
dedication of.....	46
nature of.....	46
who may make.....	47
how proved.....	48-52
how presumption of rebutted.....	52
question of intention.....	53
how accepted by the public.....	54-57
effect of.....	58
commissioners of.....	60
(See COMMISSIONERS OF HIGHWAYS.)	
HIGHWAYS, overseers of.....	111
(See OVERSEERS OF HIGHWAYS.)	
assessment of labor on.....	125
performance of labor on.....	137
proceedings on laying out.....	156
how altered or discontinued.....	180
assessment of damages on laying out.....	190
appeals from the order laying out, etc.....	206
obstructions and encroachments on.....	230
railroads in.....	9, 290
travel upon.....	315
cattle in.....	327
to be opened and worked within six years.....	176
what roads are.....	177
when turnpike roads to become.....	178
special commissioners to lay out.....	178

IDIOTS, when exempt from highway labor.....	126
IDLE, penalty for being, while laboring on highways.....	141
INDICTMENT of commissioners, for neglect to make repairs.....	75, 255
of overseers, for neglect to make repairs.....	118
as remedy for nuisances and obstructions.....	254
of bridge company, for neglect to repair bridge.....	277
INJUNCTION against commissioners of highways.....	107
INJURIES, liability of commissioners for injuries sustained from neglect	
to repair.....	73
liability of towns, injuries sustained from want of repairs.....	75
to mile-posts and guide-posts, penalty for.....	118
to highways, penalty for.....	251
to bridges, penalty for.....	264
JURY of freeholders on laying out road.....	165
not to be paid.....	169
when commissioners may alter road without.....	181
on discontinuing old road.....	85, 184
proceedings of.....	185
not to be paid.....	185
to re-assess damages.....	198-202
to be summoned where encroachment is denied.....	243
JUSTICES OF PEACE, to fill vacancy in office of commissioner.....	62
LABOR ON HIGHWAYS, who liable to be assessed for.....	125
assessment of.....	125
performance of.....	137
notice to persons assessed.....	137
notice to agents of non-resident landholders.....	138
notice to corporations.....	139
commutation for.....	139
overseer may require team, wagon, etc.....	141
hours to work.....	141
penalties for not performing.....	141, 144, 146
list of persons not performing, to be furnished supervisor.....	144
rights and liabilities of overseers in performing.....	148, 155
when amount assessed is not sufficient.....	136
LAW OF ROAD, what is.....	315
LAYING OUT HIGHWAYS, proceeding on.....	156
application.....	157, 158
survey.....	159
consent of owner when necessary.....	160
through orchard or garden.....	161, 162
through buildings and fixtures.....	162, 163
through yard or inclosure.....	163, 165
oath of freeholders when necessary.....	165
proceedings of freeholders.....	166-170
across railroad tracks.....	171
between different towns or counties.....	172
width of roads.....	173
along division lines.....	175

LAYING OUT HIGHWAYS, removal of fences	175
to be opened and worked within six years	176
special commissioners, when appointed	178
papers on, when and where filed	179
appeals from the commissioners	206
assessment of damages on	190
LIST of inhabitants, overseer to furnish	119
assessment to be added to	134
copy of, to be delivered to overseer	134
of persons and lands on, not having performed work, to be delivered to supervisor	144
MANDAMUS against commissioner	104, 262
MEETING of commissioners	65
MILE-STONES, commissioners to cause to be erected	94
overseers to erect	118
penalty for injuring	118
MINISTERS, when not liable to be assessed for labor	126
MONEY, how raised for repair of roads and bridges	88
overseer to pay over	123
NAMES omitted from assessment, to be added by overseer	134
NON-RESIDENTS, lands of, liable to assessment	126
how assessed	127
NOTICE of appointment of overseers to be filed	112
of acceptance by overseer	113
to work over highways	137
of application to lay out road	158, 167
to occupants on laying out road	169
of meeting of commissioners to assess damages	193
NUISANCE in highways	
(See OBSTRUCTIONS IN HIGHWAYS.)	
OATH, commissioners of highways to take	61
commissioners may administer to witnesses	62
of freeholders on laying out road	165
OBSTRUCTIONS IN HIGHWAYS by water-courses, race-ways, etc	24
by carrying on business in	32
overseer to remove	115
at common law	230
when allowable	231
when not allowable	232-236
in navigable rivers	236
by fallen trees	248
swinging gates	249
penalties for, under the statutes	251
abatement of	253
indictment of	254
action for special damages occasioned by	256
OLD ROADS, how discontinued	183
ORCHARD, road not to be laid through without owner's consent	161

ORDER appointing overseers, to be filed	112
laying out road, to be posted.	160
to be filed	179
to alter road, to be posted	181
to be filed	182
discontinuing road, to be posted	186
to be filed	186
appointing commissioner, to be filed	198
OWNER OF FEE, rights of	21
adjacent owner presumed to be	22, 33
may maintain trespass or ejection	23
may sink water pipes, drains, &c.	24
must restore the way to raft condition	24
liability of, for damages from drains, race-ways, &c.	24
may sell soil of highway	25
entitled to trees in highway	26
cannot carry on business in highway	32
OVERSEERS OF HIGHWAYS, appoint and qualifications	92, 111
must be an elector	111
vacancy in office of, how filled	111
manner of appointing	92, 112
penalty for refusing to serve	113
general duties of	114
to remove stones, etc.	114, 115
duty of, in repairing roads	116
duty of, in repairing bridges	117
not bound to repair without funds	117
indictment of, for neglect to repair	118
when to erect guide posts and mile boards	118
when to purchase scraper and plow	119
to deliver to town clerk list of persons liable to highway labor	119
penalties against	120, 122
to account annually,	122, 146
to pay over moneys	123, 147
penalty for neglecting to account	123, 147
compensation of	124
to cause labor assessed to be performed	137
when to make additional assessment	136
to give notice to persons assessed	137-139
may allow persons to commute	139-141
cannot themselves commute	140
may require team, cart, wagon, etc., to be furnished	141
to make complaint against persons refusing to work	142
to deliver to supervisor list of persons and lands of non-residents who have failed to perform work	144
penalty for neglecting to deliver such list	145
rights and liabilities of, in performance of labor	148-155
to assess names omitted by commissioners	134
PAUPER not liable for highway labor	126

INDEX.

505

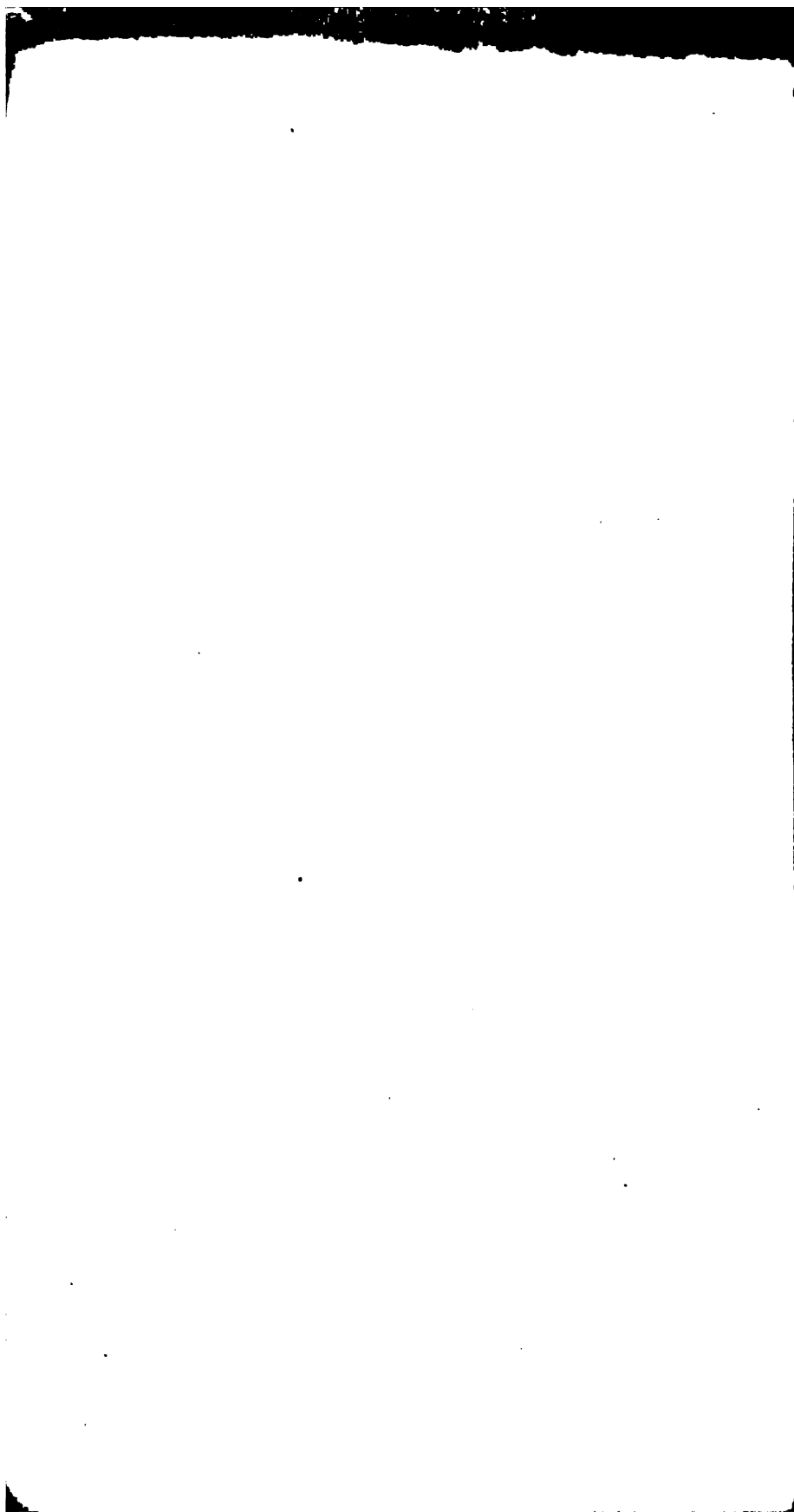
PENALTY against commissioner for refusing to serve.....	61
overseer for refusing to serve.....	113
overseers for neglect of duty.....	130
for neglect to account.....	123, 147
for not working, how collected.....	141
against corporation, how collected.....	146
PERSONS liable to be assessed for highway labor.....	125
PLANKROADS AND TURNPIKES are highways.....	7
corporation not liable for damages from reasonable repairs.....	8
fee in	30
how incorporated.....	353
how managed.....	359
application to supervisors for leave to construct.....	366
commissioners to lay out.....	368
lands, how to be procured.....	369
provision in case of using highway.....	381
construction and repair of.....	387
inspectors to be appointed.....	391
erection of gates on.....	395
tolls on, and how collected.....	399
penalty for injuring or obstructing.....	406
taxes on	408
branch roads and extensions	409
powers of purchasers of.....	414
action against corporation and stockholders.....	416
how discontinued.....	421
PRIVATE ROADS , labor on, when to be accredited.....	132
how laid out under the statute.....	345
application, how made.....	345
jury to be called	345
copy of application and notice to be delivered to applicant.....	345
service of notice and application	346
list of jurors.....	346
proceedings of jury.....	347
proceedings after verdict	348
when damages to be paid.....	348
description of road abandoned.....	349
along division lines.....	349
appeal from decision of freeholders.....	349
for what purpose to be used.....	350
width of.....	351
when obstructed owner cannot go on adjoining land.....	351
RAILROAD , when highway.....	8
fee in.....	30
in highways and streets.....	8, 290
consent of commissioners to construct.....	101
when may be constructed	290
company to restore road.....	300
compensation to owner of fee.....	291-294

RAILROAD , in highways and streets, horse railroads in street.....	295-297
remedy of owner of fee.....	297
action by commissioners.....	301
over turnpikes and plankroads.....	297
in city of New York.....	298
consequential damages.....	299
cattle guards at crossings.....	302
rights of public to travel with wagons, &c., on street railways.....	304
company to give signals at crossings.....	305
how highway laid out across.....	171
RE-ASSESSMENT of damages on laying out highway.....	198
REFEREES on appeal from commissioners' laying out, &c., road.....	200-222
proceedings.....	211-222
fees of.....	223
REPAIRS , commissioners to direct.....	68
of highways and bridges.....	71
commissioners not bound to make, without funds.....	73
liability of commissioners for not making.....	73
liability of towns and cities for.....	75-78
of bridges.....	78, 260
indictment of commissioners for neglect to make.....	75, 255
duty of overseers in making.....	116-118
indictment of overseers for neglecting to make.....	118
of toll bridges.....	275
RESIGNATION of commissioners.....	65
RETURN by commissioners to supervisor.....	88
annual, of overseer.....	122
RIVERS , when highways.....	15-20
where water changes its course.....	15
when obstructed public cannot cut another channel.....	15
when navigable at common law.....	15, 38
right of public in, above tide water.....	16
what rivers are navigable.....	38-45
when navigable in fact.....	17
where declared highway by statute.....	19, 20, 29
when made navigable by private individuals.....	19
right of public to travel on the ice.....	19
when margin of, highway.....	20
boundaries by.....	36
SCRAPER , when to be purchased.....	119
SIDEWALKS , who may make.....	307
penalty for riding or driving on.....	307
commissioners may expend part of tax upon.....	307, 308
duty of city and village corporations in repairing.....	309
liability of such corporations for neglect to repair.....	309-311
snow to be removed from.....	311
SOLDIERS , deduction from labor of.....	140
SNOW to be removed from sidewalks.....	311

STREETS are public highways	6
for what purposes may be used	6
boundaries by	33-36
railroads in	8, 290
SURVEY on laying out road	159
on altering road	181
on discontinuing road	185
SWINGING GATES in highway	249
TEAMS , overseer may require	141
TENANTS to deduct assessment	135
TIME of work on road per day	141
TOWNS , liability of, for neglect to repair	75
how road laid out between different	172
to repair bridges	260
how bridge repaired between adjoining	269
TRESPASSER cannot make dedication	47
TRAVEL UPON HIGHWAYS , law of the road	315
centre of road	315-317
centre in winter	317
travelers to turn out in time	318
travelers on horse-back	319
travelers passing in same direction	319
stopping by way-side	321
travelers bound to have harness and carriage in good condition	321
travelers on foot	321
where highway is impassable	323
running horses prohibited	324
concerning drunken drivers	324
TREES in highway belong to owner of fee	26
fallen, to be removed from highways	248
penalty for falling	248
to be removed from streams	248
may be set out along highways	249, 308
TURNPIKE	
(See PLANKROADS AND TURNPIKES.)	
VACANCY in office of commissioner, how filled	62
overseer, how filled	93, 111
in office of commissioners to assess damages	197
VERDICT on encroachments	245
WAYS , definition and nature of	336
by prescription	337-340
by grant	340-342
from necessity	343
how laid out by statute	345-351
right of, how pleaded	351
WAGONS , when may be required	141
WARNING to work on highways	80

WIDTH of public highways.....	173
of private roads.....	351
of plankroads and turnpikes.....	387
WORK of highways, who may be assessed for.....	125
how assessed.....	125-136
performance of.....	137
when may be anticipated.....	
YARD, highway not to be laid through.....	160-163





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